121 No. (1)

Supreme Court, U.S.
FILED

081110 MAR 4 - 2009

OFFICE OF THE CLERK

In The
Supreme Court of the United States

◆

**B.T. PRODUCE CO., INC.; LOUIS R. BONINO;
NAT TAUBENFELD,**

Petitioners,

v.

**UNITED STATES DEPARTMENT OF AGRICULTURE;
UNITED STATES OF AMERICA,**

Respondents.

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

◆

PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX

◆

Mark C. H. Mandell
Counsel of Record
LAW OFFICE OF MARK C.H. MANDELL
42 Herman Thau Road
Annandale, New Jersey 08801
(908) 638-4434

Counsel for Petitioners
B.T. Produce Co., Inc. and
Louis R. Bonino

Jeffrey M. Chebot
WHITEMAN, BANKES & CHEBOT, LLC
325 Chestnut Street
Constitution Place, Suite 1300
Philadelphia, Pennsylvania 19106
(215) 829-0014

Counsel for Petitioners
B.T. Produce Co., Inc. and
Nat Taubenfeld

THE LEX GROUP^VA ◆ 1108 East Main Street ◆ Suite 1400 ◆ Richmond, VA 23219
(804) 644-4419 ◆ (800) 856-4419 ◆ Fax: (804) 644-3660 ◆ www.thelexgroup.com

QUESTIONS PRESENTED

I. WHETHER THE COURT BELOW, CONTRARY TO ITS OWN PRECEDENT AND THE PLAIN LANGUAGE OF THE PERISHABLE AGRICULTURAL COMMODITIES ACT ("PACA"), IMPROPERLY IMPUTED ACTS OUTSIDE THE CORPORATE EMPLOYEE'S OR OFFICER'S SCOPE OF EMPLOYMENT OR OFFICE TO A CORPORATE PACA LICENSEE, RESULTING IN REVOCATION OF THE CORPORATE PACA LICENSE.

II. WHETHER THE COURT BELOW, CONTRARY TO ITS OWN PRECEDENT AND PRECEDENT IN THE NINTH CIRCUIT, ERRONEOUSLY FOUND TWO CORPORATE OFFICERS "RESPONSIBLY CONNECTED" TO A CORPORATE PACA LICENSEE, RESULTING IN PACA EMPLOYMENT SANCTIONS AGAINST THOSE OFFICERS UPON THE REVOCATION OF THE CORPORATE PACA LICENSE, WHEN THOSE OFFICERS COULD NOT HAVE KNOWN OF CONCEALED BRIBERY ACTIVITIES OF ANOTHER EMPLOYEE, THUS RENDERING THE TWO OFFICERS IN QUESTION "NOMINAL" UNDER PACA AND NOT "RESPONSIBLY CONNECTED."

III. WHETHER THE COURT BELOW CONSTRUED PACA IN A MANNER VIOLATING THE FIFTH AMENDMENT DUE PROCESS CLAUSE AND THE ADMINISTRATIVE PROCEDURE ACT'S JUDICIAL STANDARD FOR REVIEW, UPHOLDING AN AGENCY'S ARBITRARY AND CAPRICIOUS EXERCISE OF POWER, AS AN IRRATIONAL STATUTORY CONSTRUCTION AND IRREBUTTABLE PRESUMPTION, WHEN THE COURT SUSTAINED AN ADMINISTRATIVE AGENCY'S EMPLOYMENT SANCTIONS UNDER PACA AGAINST TWO CORPORATE PACA LICENSEE'S OFFICERS BASED UPON THE UNDISCOVERABLE ROGUE ACTIVITIES OF A THIRD OFFICER/EMPLOYEE.

IV. WHETHER THE COURT BELOW, CONTRARY TO ITS OWN PRECEDENT AND IN LIGHT OF PACA'S REGULATION OF INDIVIDUALS' ELIGIBILITY TO SERVE AS OFFICERS AND OWNERS OF PACA CORPORATE LICENSEES IMPROPERLY NARROWED THE DEFINITION OF "LICENSEE" UNDER THE APA, SO THAT AN INNOCENT CORPORATE PACA LICENSEE'S OFFICER WAS DEPRIVED OF NOTICE AND OPPORTUNITY TO COMPLY WITH PACA AND AVERT PACA EMPLOYMENT SANCTIONS.

V. WHETHER THE COURT BELOW ERRONEOUSLY DEPARTED FROM THE UNITED STATES SUPREME COURT'S CHEVRON STATUTORY CONSTRUCTION ANALYSIS, BY IMPLYING INTO THE PACA STATUTE A DUTY NOT TO BRIBE ABSENT FALSIFICATION OF PRODUCE INSPECTIONS, AND ABSENT A DEMONSTRATED IMPACT UPON A PRODUCE TRANSACTION, WHEN CONGRESS HAS SPOKEN TO THE ISSUE AND REQUIRED FALSIFICATION.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Petitioner, B.T. Produce Co., Inc., pursuant to Rule 29.6, states that it is a privately held corporation. There is no parent or publicly held corporation that owns 10% of more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6 iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES x

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

- I. The Court Below, Contrary To Its Own Precedent and the Plain Language of PACA, Improperly Imputed Acts Outside the Corporate Employee's or Officer's Scope of Employment or Office to a Corporate PACA Licensee, Resulting in Revocation of the Corporate PACA License 7

II. The Court Below, Contrary To Its Own Precedent and Precedent in the Ninth Circuit, Erroneously Found Two Corporate Officers "Responsibly Connected" to a Corporate PACA Licensee, Resulting in PACA Employment Sanctions Against Those Officers Upon the Revocation of the Corporate PACA License, When Those Officers Could Not Have Known of Concealed Bribery Activities of Another Employee, Thus Rendering the Two Officers in Question "Nominal" Under PACA and Not "Responsibly Connected." 10

III. The Court Below Construed PACA in a Manner Violating the Fifth Amendment Due Process Clause and the Administrative Procedure Act's Judicial Standard for Review, Upholding An Agency's Arbitrary and Capricious Exercise of Power, as An Irrational Statutory Construction and Irrebuttable Presumption, When the Court Sustained an Administrative Agency's Employment Sanctions Under PACA Against Two Corporate PACA Licensee's Officers Based Upon the

Undiscoverable Rogue Activities of a Third Officer/Employee 14

IV. The Court Below, Contrary to its Own Precedent and in Light of PACA's Regulation of Individuals' Eligibility to Serve as Officers and Owners of PACA Corporate Licensees, Improperly Narrowed the Definition of "Licensee" Under the APA, So That an Innocent Corporate PACA Licensee's Officer Was Deprived of Notice and Opportunity to Comply With PACA and Avert PACA Employment Sanctions........................22

V. The Court Below Erroneously Departed From the United States Supreme Court's Chevron Statutory Construction Analysis, By Implying Into the PACA Statute a Duty Not to Bribe Absent Falsification of Produce Inspections, and Absent a Demonstrated Impact Upon a Produce Transaction, When Congress Has Spoken To the Issue and Required Falsification 24

CONCLUSION..30

APPENDIX

Judgment and Memorandum in a
Civil Case
entered September 15, 2008 ....1a

Decision and Order of
The United States Department of
Agriculture before
The Secretary of Agriculture
entered May 4, 2007 ....6a

Modification of Decision of
The United States Department of
Agriculture before
The Secretary of Agriculture
entered February 15, 2006..............112a

Decision of
The United States Department of
Agriculture before
The Secretary of Agriculture
entered December 6, 2005...............114a

Order of
The United States Court of Appeals for
The District of Columbia Circuit
Re: Denying Petition for Panel Rehearing
entered December 5, 2008...............153a

Order of
The United States Court of Appeals for
The District of Columbia Circuit
Re: Denying Petition for
Panel Rehearing *en banc*
entered December 5, 2008 .... 154a

U.S. CONST. amend. V 155a

5 U.S.C. § 551 .... 156a

5 U.S.C. § 558 .... 160a

5 U.S.C. § 706 .... 162a

Perishable Agricultural Commodities Act,
Preamble 164a

7 U.S.C. § 499a 165a

7 U.S.C. § 499b 166a

7 U.S.C. § 499d 169a

7 U.S.C. § 499h 175a

7 U.S.C. § 499n 179a

7 U.S.C. § 499p 181a

18 U.S.C. § 201 .... 182a

7 C.F.R. § 46.46 .... 185a

TABLE OF AUTHORITIES

Page

CASES

Atlantic Richfield Co. v. United States,
774 F.2d 1193 (D.C. Cir. 1985) 22

B.T. Produce Co., Inc. v. Dep't of Agric.,
296 Fed. Appx. 78 (D.C. Cir. 2008) .... passim

Bell v. Dep't of Agric.,
39 F.3d 1199 (D.C. Cir. 1994) 10, 11, 14

Brennan v. Illinois Racing Board,
42 Ill. 2d 352, 247 N.E.2d 881 (1969) 20

Burger v. Board of Psych. Examiners,
521 F.2d 1056 (D.C. Cir. 1975) 20

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) .... passim

Cleveland Bd of Educ. v. Lafleur,
414 U.S. 632 (1974) 20

Coosemans Specialties, Inc. v. Dep't of Agric.,
482 F.3d 560 (D.C. Cir. 2007) .... passim

G & T Terminal Packing Co. v. Dep't of Agric.,
468 F. 3d 86 (2d Cir. 2006) 27, 28, 29

Greene v. McElroy,
360 U.S. 474 (1959) 19

Hart v. Department of Agriculture,
112 F.3d 1228 (D.C. Cir. 1997) 10, 13

In re H.C. MacClaren, Inc.,
342 F.3d 584 (6th Cir. 2003) 17, 29

In re Sid Goodman and Co., Inc.,
49 Agric. Dec. 1169 (1990), aff'd,
945 F.2d 398 (4th Cir. 1991) 28

JSG Trading Corp. v. Dep't. of Agric.,
235 F.3d 608 (D.C. Cir. 2001) 28

Kasner v. Gage,
281 Minn. 149, 161 N.W.2d 40 (1968) 9

Kleiman & Hochberg, Inc. v. USDA,
497 F.3d 681 (D.C. Cir. 2007) ....passim

Mahoney v. Byers,
187 Md. 81, 48 A.2d 600 (1946) 20

Maldonado v. Department of Agriculture,
154 F.3d 1086 (9th Cir. 1998) 11, 12, 14

Minotto v. USDA,
711 F.2d 406 (D.C. Cir. 1983) 10, 13

Nebbia v. People of New York,
291 U.S. 502 (1934) 15

Norinsberg v. USDA,
162 F.3d 1194 (D.C. Cir. 1998) 11, 12, 14

Northpoint Tech. Ltd. v. FCC,
412 F.3d 145 (D.C. Cir. 2005) 24

Phillips v. Bureau of Prisons,
591 F. 2d 966 (D.C. Cir. 1974) 19

Post & Taback, Inc. v. Dep't of Agric.,
123 Fed. Appx. 406 (D.C. Cir. 2005) 29

Quinn v. Butz,
510 F.2d 743 (D.C. Cir. 1975) 11, 14, 18

Siegel v. Lyng,
851 F.2d 412 (D.C. Cir. 1988) 16

Stoneridge Investment Partners, LLC v.
Scientific-Atlanta, Inc.,
128 S. Ct. 761 (2008) 26

Turner v. Department of Employment Sec.,
423 U.S. 44 (1975) 20

U.S. v. Carolene Prods. Co.,
304 U.S. 144 (1938) 15

Veg-Mix, Inc. v. USDA,
832 F.2d 601 (D.C. Cir. 1987) 15

Weinberger v. Salfi,
422 U.S. 749 (1975) 20

White v. Franklin,
637 F. Supp. 601 (N.D. Miss. 1986)..............23

Williamson v. Lee Optical, Inc.,
348 U.S. 483 (1955)......................................15

CONSTITUTIONAL PROVISION

U.S. CONST. amend. V.................................14, 19, 26

STATUTES

5 U.S.C. § 551..2

5 U.S.C. § 551(8)..22, 23

5 U.S.C. § 558..2

5 U.S.C. § 558(c)...22

5 U.S.C. § 706..2

5 U.S.C. § 706(2)(A)(E)...14

7 U.S.C. § 499a...2

7 U.S.C. § 499a et seq., preamble............................15

7 U.S.C. § 499a(b)(9)..................................6, 10, 15

7 U.S.C. § 499b...2

7 U.S.C. § 499b(4)..passim

7 U.S.C. § 499d...2, 19

7 U.S.C. § 499d(d) 23
7 U.S.C. § 499d(e) 23
7 U.S.C. § 499e(c) 13
7 U.S.C. § 499f 6
7 U.S.C. § 499h 2, 7, 19, 23
7 U.S.C. § 499h(a)(2) 25, 26, 27
7 U.S.C. § 499h(b) 10
7 U.S.C. § 499n 2
7 U.S.C. § 499n(b) .... passim
7 U.S.C. § 499p .... passim
18 U.S.C. § 201 .... 2, 25, 26
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2341 7
28 U.S.C. § 2342 7
28 U.S.C. § 2343 7
28 U.S.C. § 2344 7
28 U.S.C. § 2345 7
28 U.S.C. § 2346 7

28 U.S.C. § 2347 7

28 U.S.C. § 2348 7

28 U.S.C. § 2349 7

28 U.S.C. § 2350 7

REGULATIONS

7 C.F.R. § 46.46 2

7 C.F.R. § 46.46(a)(2) 13

7 C.F.R. § 46.46(d)(1) 13

7 C.F.R. § 47.49 6

OTHER AUTHORITES

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, § 9.4n. 65, at 758 (3d ed. 2006) 21

GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 915 n.4 (13th ed. 1997) 21

H.R. Rep. 1995 PACA Amendments H.R. 104-207, 104th Cong. 1st. Sess. at 11 (1995) 13-14, 16

Kramer, Donald T., 16B Am. Jur. 2d Constitutional Law § 965 20

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1622-24 (2d ed. 1988) 21

Restatement Second, Agency § 228, comment b 9

OPINIONS BELOW

The Judgment and Memorandum of the United States Court of Appeals for the District of Columbia Circuit is reported at 296 Fed. Appx. 78 (D.C. Cir. 2008). The Decision and Order of the Judicial Officer, United States Department of Agriculture, is reported at 66 Agric. Dec. 774 (2007). The Decision of the Chief Administrative Law Judge, United States Department of Agriculture, is reported at 64 Agric. Dec. 1949 (2005).

STATEMENT OF JURISDICTION

The Judgment and Memorandum of the United States Court of Appeals for the District of Columbia Circuit, affirming the Decision and Order of the Judicial Officer, United States Department of Agriculture, affirming the Decision of the Chief Administrative Law Judge, Department of Agriculture, except increasing the sanction against Petitioner, B.T. Produce Co., Inc., ("BT") from a fine to license revocation, was entered on September 15, 2008. Timely petitions for rehearing and for rehearing en banc were denied on December 5, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

[Pertinent text is reproduced in the Appendix]

United States Constitution, Amend. V
Administrative Procedure Act, 5 U.S.C. § 551
Administrative Procedure Act, 5 U.S.C. § 558
Administrative Procedure Act, 5 U.S.C. § 706
Perishable Agricultural Commodities Act, Preamble
Perishable Agricultural Commodities Act, 7 U.S.C. § 499a
Perishable Agricultural Commodities Act, 7 U.S.C. § 499b
Perishable Agricultural Commodities Act, 7 U.S.C. § 499d
Perishable Agricultural Commodities Act, 7 U.S.C. § 499h
Perishable Agricultural Commodities Act, 7 U.S.C. § 499n
Perishable Agricultural Commodities Act, 7 U.S.C. § 499p
Perishable Agricultural Commodities Act, Regulations, 7 C.F.R. § 46.46
18 U.S.C. § 201

STATEMENT OF THE CASE

A complaint was issued by the Agricultural Marketing Service ("AMS") of the United States Department of Agriculture ("USDA") on August 16, 2002, charging Petitioner B.T. Produce Co., Inc. ("BT") with willful, flagrant, and repeated violations of Section 2(4) of the Perishable Agricultural Commodities Act ("PACA") [7 U.S.C. § 499b(4)] arising out of illegal payments made to a USDA produce inspector by its employee, William Taubenfeld, allegedly in connection with 42 inspections of 41 shipments of produce at BT's place of business between March and August 1999. The payments made by William Taubenfeld were neither authorized nor discoverable by BT or the individual Petitioners, no inspections were falsified, no gain to BT or the individual Petitioners accrued, and there was no harm to any of BT's shippers, customers or competitors. JA[1] 190, 342-43, 365-66, 369-70, 377-78, 383, 398, 402, 424, 439-41, 443-49, 468, 487-89, 812-15, 818-19. In Petitioner BT's business, handling second rate, third rate and distressed produce, there would be no reason to falsify inspections. JA 191, 348, 383-84, 398, 446, 448-49, 468, 487-90, 818-19, 1036-37. None of William Taubenfeld's secret payments were made with Petitioner BT's money, they were made without any observable trade impact, and were made in spite of the individual Petitioners' diligence in management. JA 196, 206, 343 355-56, 367-70, 377G, 383, 439-46, 468, 487-89, 562, 1012.

---

[1] "JA" refers to the Joint Appendix filed by the parties in the United States Court of Appeals for the District of Columbia Circuit, below.

On March 31, 2003, the Chief of the PACA Branch of the AMS made formal determinations that Petitioners Nat Taubenfeld and Louis R. Bonino were responsibly connected with BT at the time of the alleged violations.

BT answered the Complaint, denying that it had violated the PACA, and both Nat Taubenfeld and Louis R. Bonino filed Petitions for Review regarding the responsibly connected determinations.

Chief Administrative Law Judge Marc R. Hillson ("CALJ") filed his Decision on December 6, 2005, in which he found BT to have violated the PACA, but finding no specific evidence of falsification of any of the 42 inspection certificates in question, the CALJ declined to revoke BT's PACA license, instead imposing a civil penalty of $360,000.00 in lieu of a 180-day license suspension. 142-143a. The CALJ also found Nat Taubenfeld and Louis R. Bonino to be responsibly connected with BT. 149-151a. On February 15, 2006, the CALJ modified the sanctions against BT by assessing the $360,000.00 penalty in lieu of a 90-day license suspension. 112-113a.

The AMS, BT, Louis R. Bonino and Nat Taubenfeld all filed appeals to the USDA Judicial Officer ("JO"). The JO issued his Decision and Order on May 4, 2007, agreeing with the CALJ's findings of violations and responsible connections, but rejecting the civil penalty imposed and, instead, revoking BT's PACA license. 106-109a.

The District of Columbia Circuit denied the petitions for review filed by Petitioners BT, Louis R. Bonino and Nat Taubenfeld, purporting to follow two of its earlier decisions. B.T. Produce Co., Inc. v. Dep't of Agric., 296 Fed. Appx. 78 (D.C. Cir. 2008), Judgment and Memorandum, pp. 2-3. 5a. The Court below rejected BT's arguments that the USDA may not interpret PACA to imply a duty not to bribe a USDA inspector, that the implied duties clause of PACA's § 499b(4) applies only between parties to a contract, that the USDA was required to proceed under § 499n(b) and prove actual falsification, and that the bribes were secretive and not within the scope of employment. Id. The Court below also rejected individual Petitioners Bonino and Nat Taubenfeld's arguments that they were not responsibly connected because of the secretive nature of the bribes, and Petitioner Nat Taubenfeld's additional argument that the USDA violated the Administrative Procedure Act ("APA") by not giving him notice and opportunity to halt the illegal conduct before imposing sanctions. Id. Finally, the Court below held against Petitioners regarding their argument that finding a PACA violation as to BT, and holding the individuals responsibly connected to BT would violate the Fifth Amendment. Id.

This Petition seeks to have the Court review 1.) the revocation of a corporate PACA license where an employee's acts, outside the scope of employment, were attributed to the corporation, contrary to statutory language and precedent; 2.) the finding that two of the PACA corporate licensee's officers were held "responsibly connected" under PACA, where the offending activity was both undiscoverable and uncontrollable and the officers thus were "nominal" and not subject to sanctions; 3.) imposition of license revocation sanctions against the corporate PACA licensee and employment sanctions against individual officers based on an unconstitutional irrational construction of PACA and irrebuttable presumption, where the predicate acts committed by a third party were undiscoverable; 4.) the deprivation of notice to an innocent corporate officer under the APA by narrowly defining "licensee" under the APA to exclude individuals who serve in such positions only with the permission of a federal agency, based on express statutory eligibility criteria; and 5.) the departure from this Court's Chevron analysis by creating a duty not to bribe produce inspectors under PACA absent falsification and/or connection to a commercial transaction where Congress has spoken to this issue and required these elements by statute.

Jurisdiction over the subject matter of this case when pending before the USDA with respect to Petitioner BT was pursuant to 7 U.S.C. § 499f because a complaint was brought before the Secretary of Agriculture to revoke BT's license to operate in the interstate produce business for alleged violations of 7 U.S.C. § 499b(4). Jurisdiction over the subject matter of the case when pending before the USDA with respect to Petitioners Nat Taubenfeld and Louis R. Bonino was pursuant to 7 U.S.C. § 499a(b)(9) and 7 C.F.R. § 47.49, regarding their challenges to the USDA's finding of their being responsibly connected to Petitioner BT for the purposes of BT's alleged violations.

Jurisdiction over the subject matter of the consolidated case in the U.S. Court of Appeals was based upon 28 U.S.C. §§ 2341-2350 because Petitioners were aggrieved by the final orders of the USDA JO, reproduced in the Appendix at 114a, which revoked the license of BT to operate in the interstate produce business under PACA and finally determined and held Petitioners Nat Taubenfeld and Louis R. Bonino to be responsibly connected to BT and therefore subject to employment debarment as set forth in 7 U.S.C. § 499h.

REASONS FOR GRANTING THE PETITION

I. The Court Below, Contrary To Its Own Precedent and the Plain Language of PACA, Improperly Imputed Acts Outside the Corporate Employee's or Officer's Scope of Employment or Office to a Corporate PACA Licensee, Resulting in Revocation of the Corporate PACA License.

The Court below incorrectly found that William Taubenfeld's acts of paying William Cashin, the corrupt USDA inspector, should be imputed to Petitioner BT under the authority of two prior District of Columbia Circuit decisions. B.T. Produce Co., Inc. v. Dep't of Agric., 296 Fed. Appx. 78, Judgment and Memorandum, pp. 2-3, 4a, citing Kleiman & Hochberg, Inc. v. USDA, 497 F.3d 681 (D.C. Cir. 2007) ("K&H") and Coosemans Specialties, Inc. v. Dep't of Agric., 482 F.3d 560 (D.C. Cir. 2007). PACA prescribes, however, that an employee's or officer's acts must first be "within the scope of his employment or office," in order to be "deemed the act, omission or failure of such commission merchant, dealer, or broker, as that of such agent, officer, or other person." 7 U.S.C. § 499p.

In this case William Taubenfeld's acts were outside the scope of employment. No person at BT, including other employees, knew of, could have discovered or countenanced such activity. USDA witnesses admitted that there was no evidence that BT Produce's position was improved or benefitted because of William Taubenfeld's actions, and the unrefuted evidence established that in Petitioner BT's business of handling second rate, third rate and distressed produce, there would be no reason to falsify inspections. JA 191, 348, 383-84, 398, 446, 448-49, 468, 487-90, 818-19, 1036-37. K & H did not set forth these facts and, so, is distinguishable. Coosemans did not even address the question of scope of duty and imputation of an employee's or officer's acts.

What K & H does hold is that 7 U.S.C. § 499p "simply makes applicable to wholesale produce merchants the principle of respondent superior, a substantive legal doctrine widely accepted at common law." 497 F.3d at 689. In both K & H and Coosemans, by contrast, the panels found that the petitioning merchants had benefitted from expedited inspections as a result of bribing produce inspectors. K & H, 497 F.3d at 689; Coosemans, 482 F.3d at 563, 567. In Petitioner BT's line of business under the facts of this case, William Taubenfeld's payments to Cashin did not and could not have "tended to accomplish an authorized purpose," under the common law of respondent superior, thereby removing the payments from William Taubenfeld's scope of employment. Restatement Second, Agency § 228, Comment b. See also Kasner v. Gage, 281 Minn. 149, 153-54, 161 N.W.2d 40, 43 (1968) (corporate agent's surreptitious misappropriation of competitor's customer information outside scope of employment, even though the theft was beneficial to the agent's corporate principal).

Petitioners do not seek "an escape hatch for merchants who allege ignorance of their employees' misconduct." K&H, 497 F.3d at 689. Ignorance is not the issue here. Rather, in this case and on this record, where USDA senior marketing specialist John Koller essentially admitted that there was nothing Petitioner Nat Taubenfeld could have done to prevent William Taubenfeld's activities, where Petitioner Bonino, with his police training, and in the best position to discover these activities could not discover them, and there could be no benefit to Petitioner BT thereby, William Taubenfeld's activities were outside the scope of his employment. JA 367-70, 468, 488-89, 1012. The K&H ruling does not dictate otherwise.

II. The Court Below, Contrary To Its Own Precedent and Precedent in the Ninth Circuit, Erroneously Found Two Corporate Officers "Responsibly Connected" to a Corporate PACA Licensee, Resulting in PACA Employment Sanctions Against Those Officers Upon the Revocation of the Corporate PACA License, When Those Officers Could Not Have Known of Concealed Bribery Activities of Another Employee, Thus Rendering the Two Officers in Question "Nominal" Under PACA and Not "Responsibly Connected."

Petitioners Nat Taubenfeld and Louis Bonino were nominal officers, shareholders and/or directors of Petitioner BT for the purposes of William Taubenfeld's concealed payments to a federal produce inspector, as a result of which Louis R. Bonino and Nat Taubenfeld were not "responsibly connected" and subject to employment sanctions if corporate Petitioner BT is found to have violated PACA. See 7 U.S.C. §§ 499a(b)(9) and 499h(b).

The standard for nominality as requiring an "actual significant nexus" of the officers or directors with the alleged violating company is built upon the premise and rationale that they "neither knew [n]or should have known of the [c]ompany's misdeeds." See Hart v. Department of Agriculture, 112 F.3d 1228, 1231 (D.C. Cir. 1997), quoting Minotto v. USDA, 711 F.2d 406, 408-9 (D.C. Cir. 1983); Bell v. Dep't of Agric., 39 F.3d 1199, 1201 (D.C. Cir. 1994)(actual significant nexus required).

Underpinning the "actual, significant nexus" test is the theory that "[w]here responsibility was not based on the individual's 'personal fault' it would have to be based at least on his 'failure to "counteract or obviate the fault of others." ' " Norinsberg v. USDA, 162 F.3d 1194, 1197 (D.C. Cir. 1998), citing Bell, 39 F.3d at 1201, citing Quinn v. Butz, 510 F.2d 743 (D.C. Cir. 1975). The District of Columbia Circuit, in Quinn, confirmed that its rejection of a per se rule for responsible connection was grounded in the capability of an individual to counteract offending conduct. 510 F.32d at 755-56 (either personal fault or a realistic capacity to counteract the fault of others required). The case now before the Court contravenes the District of Columbia Circuit's own carefully reasoned precedents.

The decision of the Court below with respect to Petitioners Taubenfeld and Bonino on nominality is at odds with its sister Ninth Circuit in Maldonado v. Department of Agriculture, 154 F.3d 1086 (9th Cir. 1998). Mr. Maldonado was president of the corporate PACA licensee, was head of its vegetable department, an authorized check co-signatory, and was actively engaged in a host of corporate business activities. He was also well aware that growers were not being paid in violation of PACA, and yet continued to incur produce debt for which he knew the company could not or would not pay. Id. at 1087-89 (majority opinion); 1089 (dissenting opinion). In the face of this evidence, the majority found Mr. Maldonado to be "nominal," where the corporate CEO, Dukesherer, "secretly opened a second bank account" and "methodically transferred money from the original [corporate] business account to the *secret* account, depleting the company's assets." *Id.* at 1087 (emphasis added).

Similarly, William Taubenfeld's surreptitious payments to Mr. Cashin, utilizing William Taubenfeld's own money and bypassing all safeguards effected by Petitioners Bonino and Nat Taubenfeld and Petitioner BT's staff respecting these acts, effectively nominalized the individual Petitioners in the instant case. Although Mr. Maldonado arguably could have monitored the books more closely, having assumed the mantle of presidency, yet he was held not responsibly connected based on nominality. *A fortiori*, Petitioners Bonino and Nat Taubenfeld should not be found responsibly connected where none of William Taubenfeld's secret payments were ever made with Petitioner BT's money, were without any observable trade impact, and were made in spite of individual Petitioners' diligence in management as established in the record. JA 196, 206, 343, 355-56, 367-70, 377G, 383, 439-46, 468, 487-89, 562, 1012.

Individual Petitioners' position of nominality is further supported by the District of Columbia's Circuit's own finding in *Norinsberg*, 162 F.3d at 1200 n.10. In *Norinsberg*, an owner of 15% of the common stock, who was also the corporate secretary and treasurer and a check signatory, was found to be "nominal" even though he knew the corporation was not making full and prompt payment to its produce suppliers when he signed corporate checks to or for the benefit of family members, *Id.* at 1197-98, knew what he was doing was wrong, and knowingly assisted corporate management in violation of the fiduciary duties placed upon him and his company by PACA Regulations at 7 C.F.R. § 46.46(a)(2) and (d)(1) and by statute under PACA, establishing a statutory trust for the benefit of unpaid sellers and suppliers at 7 U.S.C. § 499e(c).

In K&H and Coosemans, relied upon by the Court below, B.T. Produce Co., Inc. v. Dep't of Agric., 296 Fed. Appx. 78, Judgment and Memorandum, p.3, 5a, there was at least the suggestion of evidence that the corporate PACA licensee had received expedited inspections in consideration for bribe payments. K & H, 497 F.3d at 689; Coosemans, 482 F.3d at 566. Interference with the "normal" order of inspections performed in the New York Market would, if proven, have conferred some benefit upon the licensee flowing from the payments. In contrast, the instant case squarely presents this Court with a fact pattern of undiscoverability and no effect on any of the inspections or actual produce transactions between Petitioner BT and its trading partners, or on BT's competitors. Under the facts and on the record of the instant case, a purported duty of knowledge or constructive knowledge underlying the "actual significant nexus" of Hart and Minotto, is rendered nugatory.

In 1995, Congress amended PACA's definition of responsibly connected to "permit individuals who are responsibly connected . . . the opportunity to demonstrate that they were not responsible for the specific violation." Perishable Agricultural Commodities Act Amendment of 1995, H.R. Rep. No.

104, 207 at 11 (1995), cited in Norinsberg at 1197 (emphasis added). The record in this case firmly establishes that the individual Petitioners were not responsible for acts which they could neither detect, control, nor prevent. There was no basis for the Court below to depart from the precedents of Norinsberg, Bell, Quinn v. Butz and the Ninth Circuit's decision in Maldonado.

III. The Court Below Construed PACA in a Manner Violating the Fifth Amendment Due Process Clause and the Administrative Procedure Act's Judicial Standard for Review, Upholding An Agency's Arbitrary and Capricious Exercise of Power, as An Irrational Statutory Construction and Irrebuttable Presumption, When the Court Sustained an Administrative Agency's Employment Sanctions Under PACA Against Two Corporate PACA Licensee's Officers Based Upon the Undiscoverable Rogue Activities of a Third Officer/Employee.

Sanctioning individual Petitioners Nat Taubenfeld and Louis Bonino for the undiscoverable acts of an employee of BT, which acts had no demonstrated impact on commerce generally, and, more importantly, no effect upon any transactions involving BT and its trading partners, including its suppliers and customers, or upon its competitors, would violate the Fifth Amendment Due Process Clause and the judicial standard for review under the APA, 5 U.S.C. § 706(2)(A)(E). Such sanctions in this case are based upon an irrational statutory construction and an irrebuttable presumption by upholding the arbitrary and capricious exercise of power by the USDA. The decision of the Court below mistakenly found that the prior K&H and Coosemans decisions dispositively decided these issues adversely to the Petitioners. B.T. Produce Co., Inc. v. Dep't of Agric., 296 Fed. Appx. 78, Judgment and Memorandum, p. 3. 5a.

Due process requires that laws passed must have a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory. See Nebbia v. People of New York, 291 U.S. 502, 527-28 (1934). Regulatory legislation affecting commerce may be pronounced unconstitutional if it is of such character as to preclude the assumption that it rests on some rational basis. U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); see also Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955).

PACA's purpose is stated in its preamble as follows: "An act to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities." 7 U.S.C. § 499a et seq., preamble. Congress enacted PACA in 1930 to prevent unfair business practices and promote responsibility in the interstate commerce of shipping and handling of perishable agricultural commodities. See K & H, 497 F.3d at 685; Veg-Mix, Inc. v. USDA, 832 F.2d 601, 604 (D.C. Cir. 1987). In 1995, PACA was amended to permit an individual shareholder or officer, like the individual Petitioners, to rebut the presumption of responsible connection of a corporate principal to a PACA license. 7 U.S.C. § 499a(b)(9).

The legislative intent in this amendment was "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation." H.R. Rep. 1995 PACA Amendments H.R. 104-207, 104th Cong. 1st. Sess. at 11 (1995)(emphasis added).

Under pre-1995 amendment case law precedent, governing nonpayment cases, the standard of constitutionality was met, since a corporation's financial condition is one as to which a corporate principal is aware or, at least in the exercise of due diligence, can be aware. See, e.g., Siegel v. Lyng, 851 F.2d 412, 417 (D.C. Cir. 1988) ("inconceivable that petitioners were unaware of their financial condition"). In this case, however, the payments by William Taubenfeld were neither authorized nor discoverable by BT or the individual Petitioners, no inspections were falsified, no gain to BT or the individual Petitioners accrued, and there was no harm to any of BT's shippers, customers or competitors. JA 190, 342-43, 365-66, 369-70, 377-78, 383, 398, 402, 424, 439-41, 443-49, 468, 487-89, 812-15, 818-19. These facts underscore the Constitutional danger in automatic bootstrapping by assigning unpreventable acts of employees to corporate licensees under PACA's respondeat superior provision, 7 U.S.C. § 499p, and then punishing entirely innocent people, who could not have prevented the acts, under the responsible connection provisions. In amending PACA in 1995, Congress did not consider circumstances such as the instant case where the wrongdoing employee acted in a manner undetectable and unpreventable by BT's management, even with the exercise of careful oversight.

It is therefore not rationally related to the 1995 amendment's purpose of exonerating non-culpable corporate principals to find as responsibly connected these principals who, even with oversight, could not have uncovered and prevented the alleged wrong. John Koller, Respondent's senior marketing specialist in the USDA's PACA License and Review Sections, charged with enforcement, admitted as much. JA 488-89. Mr. Koller could not offer a rationale for sanctioning Petitioner Nat Taubenfeld (and, implicitly, Petitioner Bonino) consistent with PACA's stated purpose. JA 501.

This case is totally divergent from nonpayment cases brought under the PACA, where management can clearly track its ability to pay suppliers through the corporate business records, or the prior inspection certificate falsification and false accounting cases, where a review of transaction files would have uncovered and halted the offenses. See, e.g., In re H.C. MacClaren, Inc., 342 F.3d 584 (6th Cir. 2003)(inspection certificate falsification). Holding corporate principals accountable for actions they could not have discovered runs afoul of the legislative purpose, preventing them from demonstrating that they were, in fact, not responsible, and is offensive to traditional notions of fair play and substantial justice.

All of the cases relied upon by the K & H court, cited by the Court below, were nonpayment cases, issues clearly under the plain control of the particular licensed entities' owners and managers. Coosemans, also cited by the Court below on this point, never even addressed a constitutional due process issue.

Quinn v. Butz, decided under PACA prior to its 1995 amendment, recognized the irrationality of construing the statutory language in such a way as to sanction "per se" officers, directors and shareholder with more than 10% ownership in a corporate licensee. The Court stated that

> [A] construction of a statute leading to unjust or absurd consequences should be avoided. [footnote and citations omitted]. And 'even when the plain meaning (of statutory language) did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole' (the Court) has followed that purpose, rather than the words. [footnote and citations omitted].

510 F.2d at 753 (emphasis added).

The interpretation and result of the decision of the Court below are not reasonably related to the twin goals of promoting fair trade and protecting those officers who are not responsible for offending acts from employment sanctions. The affirmance of the USDA's position by the Court below effectively resurrected the old per se rule, which was never accepted in the District of Columbia Circuit and was rejected by Congress through the 1995 amendment, for facts such as are presented here, and places PACA's responsibly connected provisions in violation of the Due Process Clause of the Fifth Amendment. It is arbitrary and capricious to find Petitioners Nat Taubenfeld and Bonino responsibly connected when the sanctions of debarment under 7 U.S.C. §§ 499d and 499h flow from such a finding.

The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment. Greene v. McElroy, 360 U.S. 474, 492 (1959); see also, Phillips v. Bureau of Prisons, 591 F. 2d 966, 970 (D.C. Cir. 1974)(pursuit of one's profession a fundamental liberty). Dealing in produce is one of the common occupations of life which, though highly regulated under PACA, still must be afforded the requirements of due process prior to being stripped away or sanctioned by Respondent USDA. The rejection by the Court below of Petitioners' argument of due process violation by way of irrebuttable presumption under the banner of Coosemans and K & H was in error.

The strict liability interpretation of PACA's § 499p respondeat superior provision by the Court below, coupled with its upholding the finding of the individual Petitioners as responsibly connected would conclusively establish their being subjected to employment sanctions for the unauthorized rogue acts of William Taubenfeld. There is no set of facts under this scenario under which the individual Petitioners may exonerate themselves for those acts. Their responsible connections triggering employment sanctions would become a foregone conclusion and an unconstitutional irrebuttable presumption, regardless whether they were "responsible" under any ordinary meaning of that word. See Kramer, Donald T., 16B Am. Jur. 2d Constitutional Law § 965.

In several situations, including regulated activities and licensed fields, the United States Supreme Court has stricken rules and statutes on the basis that irrebuttable presumptions violated due process. See Turner v. Department of Employment Sec., 423 U.S. 44, 46 (1975); Cleveland Bd of Educ. v. Lafleur, 414 U.S. 632, 649 (1974); see also, Burger v. Board of Psych. Examiners, 521 F.2d 1056, 1062 (D.C. Cir. 1975) (irrebuttable presumption of psychiatrist's professional competence absent a graduate degree for psychiatry license applicant). Horse doping decisions in the highest courts of two states are directly on point and support the individual Petitioners' position. See Brennan v. Illinois Racing Board, 42 Ill. 2d 352, 354-57, 247 N.E.2d 881, 882-84 (1969); Mahoney v. Byers, 187 Md. 81, 87-8, 48 A.2d 600, 604 (1946).

The "irrebuttable presumption" line of authority was called into question, although never overruled, in Weinberger v. Salfi, 422 U.S. 749, 771-72, 777 (1975). Salfi is distinguishable however. Salfi involved a non-contractual claim to receive funds from the public treasury, which enjoys no constitutionally protected status, not the right to pursue an occupation.

K & H noted that several commentators had called into question the continuing viability of the constitutional doctrine of "irrebuttable presumption." 497 F.3d at 689 n.5, citing authorities. These authorities, however, are more allowing of the doctrine of irrebuttable presumption than K & H would suggest, and see the utility of irrebuttable presumption analysis when a fundamental right is at stake. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, § 9.4n. 65, at 758 (3d ed. 2006); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 915 n.4 (13th ed. 1997); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1622-24 (2d ed. 1988).

The upholding of an irrebuttable presumption by the Court below will result in an unconstitutional loss of livelihood for the individual Petitioners, who will have no means by which to exonerate themselves and avoid employment sanctions, even though they could not have discovered or prevented the offending activity.

IV. The Court Below, Contrary to its Own Precedent and in Light of PACA's Regulation of Individuals' Eligibility to Serve as Officers and Owners of PACA Corporate Licensees, Improperly Narrowed the Definition of "Licensee" Under the APA, So That an Innocent Corporate PACA Licensee's Officer Was Deprived of Notice and Opportunity to Comply With PACA and Avert PACA Employment Sanctions.

Under the APA, a license "includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8). APA notice and opportunity to correct an asserted PACA violation should have been afforded to Petitioner Nat Taubenfeld directly as a "licensee" in the broad sense described in Atlantic Richfield Co. v. United States, 774 F.2d 1193, 1200 (D.C. Cir. 1985). PACA's § 499p should not apply to impute William Taubenfeld's conduct, and/or his "willfulness" to Petitioner Nat Taubenfeld, to deprive him of notice and opportunity to correct William's bribe payments. See 5 U.S.C. § 558(c). The Court below in the instant case incorrectly declined to accept the broad definition of "license." B.T. Produce Co., Inc. v. Dep't of Agric., 296 Fed. Appx. 78, Judgment and Memorandum, p.3. 5a. The Court below purported to follow K & H, which had rejected the broad construction of "license" in a footnote, without extensive analysis or the issue having been squarely raised in that case. 497 F. 3d at 691n.7.

There is, in fact, a license *or permission* necessary to hold stock in a PACA licensee or to be an officer of a PACA licensee. PACA itself explicitly details various permissions and requirements accorded to or impressed upon individuals who wish to participate as owners or employees of literal "licensees" who may be legal entities. *See* 7 U.S.C. §§ 499d(d) and (e)(denial of officership or ownership to convicted felon or PACA violator; bonding or denial of stock ownership or officership for individuals previously adjudicated bankrupt); and 499h (principals "responsibly connected" to entity PACA violators barred from employment for a period, but "may" be approved for employment by Secretary of Agriculture after a prescribed period and/or upon bonding).

A federal district court, in the context of a due process hearing, was confronted with the issue of the breadth of meaning of "other form of permission" within the definition of "licensee" under the APA. *White v. Franklin*, 637 F. Supp. 601, 609-10 (N.D. Miss. 1986). The *White* court held that "*[b]oth the permission of the FAA* and the certificate memorializing such permission *constitute* '*licenses*' within the meaning of 5 U.S.C. § 551(8)." *Id*. at 610 (emphasis added).

Under the APA, Petitioner Nat Taubenfeld was entitled to notification from the USDA to achieve compliance with PACA requirements, not based on his status as a principal of licensee Petitioner BT, but as a licensee in his own right, within the meaning of the APA. The Secretary of Agriculture failed to comply with the APA's requirement to notify Petitioner Nat Taubenfeld to afford him that opportunity.

V. The Court Below Erroneously Departed From the United States Supreme Court's Chevron Statutory Construction Analysis, By Implying Into the PACA Statute a Duty Not to Bribe Absent Falsification of Produce Inspections, and Absent a Demonstrated Impact Upon a Produce Transaction, When Congress Has Spoken To the Issue and Required Falsification.

In upholding the USDA's finding that Petitioner BT committed a violation of PACA, when one of its employees/officers secretively bribed a federal produce inspector without authorization, absent falsification of inspections and absent any impact on any produce transaction, the Court below ignored the Supreme Court's rule prescribing a two-step analysis of statutory constructions. See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). Under Chevron, if "the intent of Congress is clear, . . . [a court] must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. As succinctly put by the District of Columbia Circuit Court of Appeals, "under the Chevron two-step, we must stop the music at step one if the Congress 'has directly spoken to the precise question at issue' because we . . . and the agency . . . 'must give effect to unambiguously expressed intent.'" Northpoint Tech, Ltd. v. FCC, 412 F.3d 145, 151 (D.C. Cir. 2005), citing Chevron, 467 U.S. at 842-43. There is then no need to reach the second step and uphold an agency's reasonable interpretation upon a finding of statutory silence or ambiguity. See id. at 843.

PACA is neither silent nor ambiguous regarding the requirement of falsification in connection with produce inspections. Falsification of produce inspection certificates is unambiguously proscribed in 7 U.S.C. § 499n(b), a violation of which may result in sanctions under 7 U.S.C. § 499h(a)(2). There is also an express duty under PACA not to use falsified inspections and/or issue false statements and accountings to trading partners and it is required to find violations of duty that they be in connection with a commercial transaction under 7 U.S.C. § 499b(4). Considering these sections together, Congress unambiguously established the grounds for license revocation arising out of and relating to produce inspections. It likewise established the burdens of proof, either being actual falsification under 7 U.S.C. § 499n(b), or use of a falsified certificate as a false statement to a trading partner under 7 U.S.C. § 499b(4).[2] In the instant case, however, both of these elements are absent, and the USDA Judicial Officer and the Court below violated the Chevron mandate by implying a duty not to bribe as a means to revoke BT's PACA license absent actual falsification of the inspections or any proven observable trade impact or connection with an actual commercial connection. JA 196, 206, 343,

---

[2] Congress has also already addressed bribery of a public official as a serious crime, 18 U.S.C. § 201, leaving no question that all citizens, both real and corporate, have an express duty not to make illegal payments to any public official, including USDA produce inspection officers.

355-56, 367-70, 377G, 383, 439-46, 468, 487-89, 562, 1012.

Petitioner BT had a clear Fifth Amendment Due Process right to retain its PACA license until and unless the burden of proof placed upon the Secretary of Agriculture by Congress was met by competent evidence. Petitioners Taubenfeld and Bonino had the same Fifth Amendment right not to be punished until that same burden was met. There is neither need nor justification under the PACA for attempting to circumvent the express statutory scheme already laid out by Congress in 7 U.S.C. § 499n(b), 499b(4), 499h(a)(2), and 18 U.S.C. § 201. It is apparent that, having specifically established both the violations and their consequences, there was no intent by Congress also to create an implied duty in PACA regarding bribery of inspections officers. Such a duty would be superfluous in the established scheme. As this Court recently held in Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 773 (2008), when it declined to find an implied right of action in a different federal statute, "[i]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent [of Congress] to create one . . . " Without the requisite congressional intent to create an implied duty, the Secretary of Agriculture, through the JO, was not authorized, under the Chevron limitations, to find what Congress did not put into the implied duty clause of 7 U.S.C. § 499b(4).

The Court below erroneously relied upon its earlier decisions in K & H and Coosemans.

In K & H, John Thomas, the corporate employee, paid bribes to "expedite" the timing of the inspections requested by the receiver. Receiving inspections out of the normal schedule, either could have conferred an improper benefit upon the corporate PACA licensee in its dealings with others, or resulted in an improper detriment to its competitors, who were also waiting for inspections to be done.[3] Such benefit or detriment would have impacted pending produce transactions subject to the provisions of 7 U.S.C. § 499b(4), which requires that violations occur "in connection with" a produce transaction. No such sets of facts are presented in this case, so K & H is not relevant authority. Coosemans is likewise inapplicable because it, too, concerned expediting of inspections, and thus, by implication, § 499b(4) transaction violations.

Both K & H and Coosemans had relied upon the Second Circuit's decision in G & T Terminal Packing Co. v. Dep't of Agric., 468 F. 3d 86 (2d Cir. 2006), in reading into PACA an implied duty not to bribe produce inspectors, even absent falsification or an impact upon a commercial transaction. See K & H, 497 F.3d at 687; Coosemans, 482 F.3d at 564. G & T, however, involved the actual falsification of the subject inspections by the corporate PACA licensee's principal, Spinale, constituting a direct violation of PACA under 7 U.S.C. §§ 499n(b) and 499h(a)(2). Not only are these not the facts in the instant case, but it was unnecessary for the G & T court to permit the USDA to invent a new implied duty. By finding §

---

[3] The K & H record contained no evidence of actual acceleration of inspections outside of the normal order.

499b(4) to be vague so as to pass the first step of the Chevron test, the G &T court ignored that Congress had spoken directly to the requirements of falsification and transactional connection in 7 U.S.C. §§ 499n(b) and 499b(4), respectively.

That Coosemans and G & T are not only factually distinguishable from this case, but also are analytically flawed, is underscored by the commercial bribery cases underlying all of these decisions. In the commercial bribery cases, the courts found an implied duty not to bribe a purchaser's employee in order to obtain sales. See JSG Trading Corp. v. Dep't. of Agric., 235 F.3d 608, 610-11 (D.C. Cir. 2001) (cited by K & H, Coosemans and G & T); In re Sid Goodman and Co., Inc., 49 Agric. Dec. 1169 (1990), aff'd, 945 F.2d 398 (4th Cir. 1991). The implied duty in these cases was clear and arose out of the direct duty to deal fairly with a trading partner. It is axiomatic that no system which seeks to establish fair and honest trading can tolerate corruption of a customer's employees or agents in order to obtain sales. Although the results in Coosemans, and G & T may have been correct, their reliance upon JSG in enunciating an implied duty, even absent an impact upon a commercial transaction was misplaced. The implied duty in JSG and commercial bribery cases was predicated upon a violation in connection with an actual produce transaction and a duty owed to the PACA licensee's trading partner, as well as competing vendors vying for the same business customer.

K & H, Coosemans, and G & T are inapplicable to the case at bar because there was no demonstrated impact upon a produce transaction established in this case from which a violation of § 499b(4) could be implied. The results in these precedents might have been correct, based upon the actual effect of expediting or falsifying inspections upon produce transactions. Indeed, there is an express duty under § 499b(4) not to use falsified inspections and/or issue false statements and accountings to trading partners as were done in G & T and Post & Taback, Inc. v. Dep't of Agric., 123 Fed. Appx. 406 (D.C. Cir. 2005). There may be an implied duty under §499b(4) not to interfere with the normal order of inspections either to obtain an advantage in a transaction or to prejudice other merchants similarly waiting for inspections as could have been involved in the K & H[4] and Coosemans decisions relied upon by the Court below, as in the commercial bribery cases. Nevertheless, K & H, Coosemans, and G & T unnecessarily overstated an implied duty under PACA to the extent they suggest that neither falsification nor an impact upon a produce transaction is necessary to find a PACA violation. These dicta exceeded the bounds of the commercial bribery cases as well as the express requirements of PACA, and resulted in an incorrect decision in the instant case.

There is an underlying implied duty under 7 U.S.C. § 499b(4) upon owners and managers of PACA licensees to exercise due diligence in order to prevent such things as falsifications of inspections from being done by employees under their charge, as was set forth in the MacClaren case. In MacClaren, actual falsification of inspection certificates was manifestly observable by management in the licensee's transaction files and records. All implied duties under § 499b(4), however, are subject to the congressional limitation in that subsection that a failure to perform them be "without reasonable cause" in order to constitute a violation. Consequently, PACA, while a strict statute, does not impose the requirement of prescience or extrasensory perception upon owners and managers. Where the activities of the rogue employee in the instant case were neither observable nor detectable by management, and without any commercial impact, there cannot have been a violation of an implied duty in this case under PACA's plain language.

---

[4] See footnote 3, above.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

/s/ Mark C. H. Mandell
MARK C. H. MANDELL
Counsel of Record
42 Herman Thau Road
Annandale, NJ 08801
(908) 638-4434

Attorney for Petitioners B.T. Produce Co., Inc., and Louis R. Bonino

JEFFREY M. CHEBOT
WHITEMAN, BANKES & CHEBOT, LLC
Suite 1300 Constitution Place
325 Chestnut Street
Philadelphia, PA 19106
(215) 829-0014

Attorney for Petitioners B.T. Produce Co., Inc. and Nat Taubenfeld

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Entered September 15, 2008]

No. 07-1240

September Term 2008

AGRI-D02002-3
AGRI-PACA-D-02-0023

B.T. Produce Co., Inc.,

Petitioner

v.

Department of Agriculture and
United States of America,

Respondents

Consolidated with 07-1241, 07-1242

Before SENTELLE, *Chief Judge*, and HENDERSON and KAVANAUGH, *Circuit Judges*.

Petitions for Review of an Order of the United States Department of Agriculture

JUDGMENT

These petitions were considered on the record of the United States Department of Agriculture and on the briefs filed by the parties. *See* Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j).

For the reasons set forth in the attached memorandum, it is **ORDERED AND ADJUDGED** that the petitions for review be denied.

Pursuant to Rule 36 of this Court, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1240

September Term 2008

MEMORANDUM

In 1999, the United States Department of Agriculture ("USDA" or "Agency") uncovered widespread corruption in the USDA produce inspection system at Hunts Point Terminal, a wholesale produce market in the Bronx. As part of the investigation, a USDA inspector—previously arrested for taking bribes—cooperated with the Agency and conducted inspections while wearing recording devises to document the bribes he received. During the five months he worked undercover, the inspector reported receiving 42 bribes from the produce buyer for B.T. Produce. As a result, the Agricultural Marketing Service of the USDA ("AMS") brought a complaint against B.T. Produce, alleging that the company failed, without reasonable cause to perform a specification or duty, express or implied, arising out of an undertaking in connection with transactions involving perishable agricultural commodities purchased, received and accepted in interstate and foreign commerce, in violation of the Perishable Agricultural Commodities ACT ("PACA") 7 U.S.C. § 499b(4). The AMS also determined that Nat Taubenfeld and Louis Bonino, the company's president and vice president, respectively, were responsibly connected to B.T. Produce while the company violated the PACA, making them subject to individual discipline. *See* 7 U.S.C. § 499a(b)(9), 499h(b).

The Chief Administrative Law Judge ("CALJ") held a ten-day hearing on the three consolidated cases. After hearing all the evidence, the CALJ concluded that B.T. Produce committed 42 willful and flagrant violations of section 499b(4) by paying bribes to the USDA inspector. Although this conclusion authorized the CALJ to revoke B.T. Produce's PAVA license, the judge instead imposed a civil penalty of $360,000. The CALJ also held that Taubenfeld and Bonino were responsibly connected to the company. All parties appealed the CALJ's decision to the Judicial Officer ("JO"), to whom the Secretary of Agriculture has delegated final authority in adjudicative proceedings. *See* 7 C.F.R. § 2.35. The JO affirmed the CALJ on every issue except the sanction against B.T. Produce, which the JO increased to the maximum sanction of license revocation. B.T. Produce, Taubenfeld, and Bonino petitioned this court for review of the JO's decision that the company violated the PACA and that the officers were responsibly connected to the company.

Before us, B.T. Produce argues that it did not violate the PACA because the Agency may not interpret section 499b(4) to include a duty not to bribe the USDA inspector, the implied duties clause of section 499b(4) applies only between parties to a contract, the Agency was required to proceed under section 499n(b) and prove actual falsification of specific inspection certificates, and the bribes were secretive and not in the scope of employment. Each of these issues is governed by our decision in

Kleiman & Hochberg, Inc. v. USDA, 497 F.3d 681 (D.C. Cir 2007) and *Coosemans Specialties, Inc. v. USDA*, 482 F.3d 560 (D.C. Cir 2007), which require us to reject B.T. Produce's arguments. Taubenfeld and Bonino argue that they were not responsibly connected to the company because of the secret nature of the produce buyer's bribes, and Taubenfelt argues that the USDA violated the Administrative Procedure Act by not giving him notice and opportunity to halt the illegal conduct before it brought sanctions against him. As with the other issues in this case, *Kleiman & Hochberg* and *Coosemans Specialties* govern and reject these arguments. Finally, Taubenfeld and B.T. Produce argue that holding them responsible violates the Fifth Amendment to the Constitution, but *Kleiman & Hochberg* and *Coosemans Specialties* also dispositively decide this issue against them.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

[Entered May 4, 2007]

In re:	)	PACA Docket
B.T. Produce Co., Inc.,	)	No. D-02-0023
	)	
Respondent	)	
	and	
In re:	)	PACA Docket
Louis R. Bonino,	)	No. APP-03-0009
	)	
Petitioner	)	
	and	
In re:	)	PACA Docket
Nat Taubenfeld,	)	No. APP-03-0011
	)	
Petitioner	)	**Decision and Order**

PROCEDURAL HISTORY

Eric M. Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Agricultural Marketing Service], instituted this administrative proceeding by filing a Complaint on August 16, 2002. The Agricultural Marketing Service instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Agricultural Marketing Service alleges: (1) B.T. Produce Co., Inc. [hereinafter B.T. Produce], during the period March 1999 through August 1999, through its officer, William Taubenfeld, made illegal payments to a United States Department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 26 sellers in interstate or foreign commerce; (2) B.T. Produce, on numerous occasions prior to March 1999, made illegal payments to a United States Department of Agriculture inspector; and (3) B.T. Produce, willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).[1] On September 30, 2002, B.T. Produce filed an answer denying the material allegations of the Complaint and raising five affirmative defenses.[2]

On March 31, 2003, James R. Frazier, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Chief], issued determinations that Louis R. Bonino and Nat

---

[1] Compl. ¶¶ III-VI.

[2] Answer ¶¶ 4-21.

Taubenfeld were responsibly connected with B.T. Produce during the period March 1999 through August 1999, and prior to that time, when B.T. Produce violated the PACA. On April 18, 2003, Louis R. Bonino and Nat Taubenfeld each filed a Petition for Review of Chief's Determination pursuant to the PACA and the Rules of Practice seeking reversal of the Chief's March 31, 2003, determinations that they were responsibly connected with B.T. Produce.

On June 20, 2003, former Chief Administrative Law Judge James W. Hunt consolidated the disciplinary proceeding, *In re B.T. Produce Co., Inc.*, PACA Docket No. D-02-0023, with the two responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011.[3]

On December 8-11, 2003, February 17-20, 2004, and August 3-4, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] presided over a hearing in New York, New York. Christopher Young-Morales and Ann Parnes, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Agricultural Marketing Service and the Chief. Mark C. H. Mandell, Annandale, New Jersey, represented B.T. Produce and Louis R. Bonino. Jeffrey M. Chebot, Whiteman, Bankes &

---

[3] *In re Louis R. Bonino* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0009, filed June 20, 2003; *In re Nat Taubenfeld* (Order Consolidating Cases For Hearing), PACA Docket No. APP-03-0011, filed June 20, 2003.

Chebot, Philadelphia, Pennsylvania, represented B.T. Produce and Nat Taubenfeld.

On December 6, 2005, after the parties filed post-hearing briefs, the Chief ALJ issued a Decision [hereinafter Initial Decision] in which the Chief ALJ: (1) concluded B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) when William Taubenfeld paid bribes to a United States department of Agriculture inspector in connection with 42 inspections of perishable agricultural commodities which B.T. Produce purchased, received, and accepted from 6 sellers in interstate or foreign commerce; (2) concluded Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; and (3) assessed B.T. Produce a $360,000 civil penalty in lieu of a 180-day suspension of B.T. Produce's PACA license.[4] On February 15, 2006, the Chief ALJ modified the sanction imposed on B.T. Produce by assessing B.T. Produce a $360,000 civil penalty in lieu of a 90-day suspension of B.T. Produce's PACA license.[5]

On April 10, 2006, B.T. Produce, Louis R. Bonino, Nat Taubenfeld, the Agricultural Marketing Service, and the Chief appealed to the Judicial Officer. On May 2, 2006, the Agricultural Marketing Service and the Chief filed a response to B.T. Produce's, Louis R. Bonino's, and Nat Taubenfeld's appeal petitions. On May 5, 2006, Nat Taubenfeld filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 8, 2006, Louis R. Bonino filed a response to the Agricultural Marketing Service's and the Chief's appeal petition, and B.T. Produce filed a response to the Agricultural Marketing Service's and the Chief's appeal petition. On May 16, 2006, the Hearing Clerk transmitted the record, except for an exhibit identified as CX 21,[6] to the Judicial Officer for consideration and decision.

---

[4] Initial Decision at 1-2, 17-19, 32.

[5] Modification of Decision.

Based upon a careful consideration of the record, I affirm the Chief ALJ's conclusions that B.T. Produce committed violations of the PACA and that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA. However, I reject the sanction imposed by the Chief ALJ and conclude the appropriate sanction is the revocation of B.T. Produce's PACA license. Consequently, Louis R. Bonino and Nat Taubenfeld are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Agricultural Marketing Service exhibits are designated by "CX." B.T. Produce's exhibits are designated by "RX." Transcript references are designated by "Tr."[7] The exhibits upon which the Chief relied for his responsibly connected determination related to Louis R. Bonino are designated by "RC-Bonino." The exhibits upon which the Chief relied for his responsibly connected determination related to Nat Taubenfeld are designated by "RC-Taubenfeld."

---

[6] CX 21 is a tape recording of an April 23, 1999, conversation between William Taubenfeld and William Cashin which the Chief ALJ received into evidence over the objection of counsel for B.T. Produce, Louis R. Bonino, and Nat Taubenfeld (Tr. 958-1030).

APPLICABLE STATUTORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499a. Short title and definitions

. . . .

---

[7] Transcript page references in this Decision and Order differ from transcript page references in the Chief ALJ's Initial Decision. References to page numbers in this Decision and Order are determined by use of the printed official transcript on file in the Hearing Clerk's office.

(b) Definitions

For purposes of this chapter:

. . . .

(9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural

commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

. . . .

§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required).

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who–

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension; [or]

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect[.]

. . . .

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person–

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days['] notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

7 U.S.C. §§ 499a(b)(9), 499b(4), 499d(a), (b)(A)-(B), (c), 499h(a)-(b), (e), 499p.

18 U.S.C.:

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

. . . .

CHAPTER 11—BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section–

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

. . . .

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever–

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent–

A) to influence any official act[.]

. . . .

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . . .

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. §§ 201(a)(1), (3), (b)(1)(A), (b)(2).

DECISION

Decision Summary

I conclude B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), as a consequence of William Taubenfeld's (B.T. Produce's secretary and director) paying bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities which B.T. Produce purchased, received, and accepted in interstate or foreign commerce. Based on this conclusion, I revoke B.T. Produce's PACA license. I also conclude Louis R. Bonino and Nat Taubenfeld were *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino and Nat Taubenfeld are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Factual Background

Hunts Point Terminal Market, located in New York City, is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of B.T. Produce. The produce houses at Hunts Point Terminal Market handle large volumes of produce delivered from points throughout the world. Because produce may have been shipped from many thousands of miles away from New York City, inspections by United States Department of Agriculture inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point Terminal Market.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may request inspection at the behest of the shipper or another party. Approximately 22,000 produce inspections are conducted annually by United States Department of Agriculture inspectors at Hunts Point Terminal Market. These inspections are crucial to the successful working of the Hunts Point Terminal Market and other produce markets, as the United States Department of Agriculture is a neutral party that examines the produce and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the produce. The United States Department of Agriculture inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the produce and can result in the renegotiation of terms regarding the sale of the produce.

As a general rule, produce must be sold as quickly as possible. This need for expedited sale is particularly true with produce that is near ripe or ripe or that has defects, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where a United States Department of Agriculture inspection is requested, immediate sale of the produce is often beneficial to the wholesaler and the shipper in order to obtain the best price for the produce. Essentially, every hour ripe or defective produce remains unsold costs someone money. However, inspection of the produce is in everyone's best interest, so that an accurate accounting of the state of the produce is available to settle possible disputes.

A 1999 investigation, known as Operation Forbidden Fruit, conducted primarily by the Federal Bureau of Investigation with the significant involvement of United States Department of Agriculture's Office of the Inspector General, identified a number of United States Department of Agriculture inspectors at the Hunts Point Terminal Market who were receiving bribes in connection with the inspection of produce and a number of Hunts Point Terminal Market produce houses that were paying these bribes.

The Agricultural Marketing Service's principal witness, William J. Cashin, is a former United States Department of Agriculture inspector, who was caught accepting bribes and was arrested by the Federal Bureau of Investigation.[8] To avoid a prison term, William Cashin agreed to cooperate with the investigation and to wear or carry devices allowing him to record, either through audio or audio-visual means, many of the transactions that involved the alleged offering and taking of bribes.[9] During the course of William Cashin's participation in Operation Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, William Cashin continued his normal business activities as a United States Department of Agriculture produce inspector. At the conclusion of each business day, William Cashin would meet with Federal Bureau of Investigation and Office of the Inspector General agents to discuss the day's events, principally the transactions for which he received bribes and the amounts of the bribes. William Cashin gave the money he received as bribes during each of these meetings to Federal Bureau of Investigation and Office of the Inspector General agents.[10] These meetings are recorded on the FBI 302 forms, many of which were received in evidence at the hearing.[11]

William Cashin testified, for each of the 42 inspections that he conducted at B.T. Produce between the time of his arrest and his resignation, he was paid $50 in bribes by William Taubenfeld, who at that time was the secretary and a director of B.T. Produce.[12] William Cashin stated, in connection with 60 percent to 75 percent of his inspections, he gave "help" to B.T. Produce in the form of overstating the percentage of defects, overstating the number of containers inspected, or misstating the temperatures of the load.[13]

---

[8] Tr. 60.

[9] CX 5; Tr. 60-62.

[10] Tr. 61-62.

[11] CX 6-CX 19.

William Taubenfeld, who is the son of Nat Taubenfeld, was indicted on October 21, 1999, for 13 counts of bribery of a public official.[14] On May 16, 2000, William Taubenfeld pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to William Cashin on July 14, 1999.[15] In his plea, William Taubenfeld stated he paid the bribes to a United States Department of Agriculture inspector "with the expectation that on some occasions he would give me favorable treatment by downgrading his rating of produce that he was inspecting."[16] William Taubenfeld was sentenced to 15 months in prison, 3 years probation, and ordered to pay a $4,000 fine and $14,585 in restitution.[17] William Taubenfeld's connections with

---

[12] CX 1 at 9, 11-12, 15-16, 18-22, CX 20; Tr. 46-47.

[13] Tr. 48-53, 58-59.

[14] CX 3; Tr. 256-57.

[15] CX 4.

[16] RX QQ at 12.

[17] CX 4; Tr. 257-58.

B.T. Produce were severed shortly after his arrest.[18] William Taubenfeld did not appear at the hearing.

B.T. Produce handles second rate, third rate, and distressed produce.[19] Much of the produce B.T. Produce handles has been rejected by other produce houses or stores. B.T. Produce has a reputation for being able to sell lower grades of produce or produce with significant defects for good value, so that others send B.T. Produce lower quality merchandise because B.T. Produce is able to make them more money than they could make otherwise. A number of witnesses testified they were aware that produce inspected by William Cashin at B.T. Produce contained many problems, since that was why they sent the produce to B.T. Produce in the first place, and they were not surprised when they saw the United States Department of Agriculture inspection certificates. Further, these witnesses were generally pleased with the results achieved by B.T. Produce in the sale of the produce.

Nat Taubenfeld,[20] the president and a director of B.T. Produce,[21] has been in the fruit and vegetable business since he arrived in the United States in

---

[18] Tr. 709.

[19] Tr. 605, 699, 1786-90.

[20] Nat Taubenfeld's given name is Naftali, but he is referred to in his business and in this Decision and Order as Nat.

[21] CX 1; RC-Taubenfeld 1.

1949.[22] In 1990, Nat Taubenfeld founded the current B.T. Produce business (he had used the same name in a previous business a few decades earlier) with Louis R. Bonino as a part owner.[23] Nat Taubenfeld worked the fruit and vegetable side of the business, while Louis R. Bonino primarily served as office manager, supervising employees and managing money.[24] Nat Taubenfeld brought William Taubenfeld into the business from the time of its establishment and gradually brought his son David Taubenfeld in as well.[25] Nat Taubenfeld gave both William Taubenfeld and David Taubenfeld shares in the business, although no compensation was involved for these transactions and no share certificates were issued.[26]

Nat Taubenfeld stated he was unaware that his son William Taubenfeld was bribing William Cashin. He further stated he had never given money to any United States Department of Agriculture inspector to "attempt to influence the result of that produce inspection[.]"[27] However, Nat Taubenfeld stated that, on a number of occasions, he gave William Cashin money, not to influence inspections, but as an act of charity in response to solicitations from William Cashin for loans to help William Cashin in his relationship with his girlfriend.[28] Nat Taubenfeld was not sure of the time period for these loans. William Cashin testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Produce.[29]

---

[22] Tr. 688-90.

[23] Tr. 688, 696-99.

[24] Tr. 698.

[25] Tr. 701-02.

[26] Tr. 703-04.

[27] Tr. 707.

No evidence was introduced indicating that Louis R. Bonino knew anything about the bribes William Taubenfeld paid to William Cashin. Mr. Bonino was not involved in the buying and selling of fruit and vegetables and managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer and who owned a trucking business before joining Nat Taubenfeld in forming B.T. Produce, signed checks and contracts, established surveillance measures, and managed office staff at B.T. Produce.[30] Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce from the time it was created in 1990.[31] As part of his duties, Louis R. Bonino handled the 30 to 40 reparation cases that arose as a result of Operation Forbidden Fruit, which resulted in B.T. Produce paying reparations of $400,000 to $500,000.[32] Mr. Bonino expressed surprise as to why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T. Produce and stated he was not aware of the illegal payments.[33]

---

[28] Tr. 711-12.

[29] Tr. 42-44.

[30] Tr. 595-602.

[31] CX 1; RC-Bonino 1.

[32] Tr. 610-12.

Much of the hearing consisted of testimony concerning the 42 United States Department of Agriculture inspection certificates and the "help" William Cashin provided B.T. Produce with respect to the produce that was the subject of these United States Department of Agriculture inspection certificates. Since William Cashin steadfastly maintained that he had no specific memory of how he helped B.T. Produce in any particular inspections and since the Agricultural Marketing Service called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by William Cashin's actions, there is no evidence that any particular United States Department of Agriculture inspection certificate was inaccurate. On the other hand, B.T. Produce personnel testified that each of the United States Department of Agriculture inspection certificates was accurate. Moreover, their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information on the United States Department of Agriculture inspection certificates was consistent with what they expected, given what these shippers knew of the condition of the produce.

---

[33] Tr. 613-14.

While the Agricultural Marketing Service called no witnesses, other than William Cashin, who could have corroborated that any particular United States Department of Agriculture inspection certificate was falsified, B.T. Produce's witnesses testified as to their recollection of each transaction. Not only did Nat Taubenfeld and David Taubenfeld testify regarding produce they handled that was the subject of the 42 United States Department of Agriculture inspection certificates, but office manager Robin Long; salesman Michael Bonino, who is the son of Louis R. Bonino; Steven Goodman, who was affiliated with the shipper JSG Trading Corp.; Peter Silverstein, the president of Northeast Trading, Inc.; and Harold Levy, a fruit broker at Northeast Trading, Inc.; all testified as to their roles in many of these transactions.

I find several of the transactions worth discussing in more detail. For example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the Complaint, which was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which had been received by B.T. Produce 2 days earlier. On the receiving ticket, Nat Taubenfeld noted in his own handwriting that the plums were "very ripe."[34] This notation indicated to him that "the merchandise had to be moved quick, sold under any price, and not play around with it."[35] The shipment was "pas" or price after sale, indicating that a final price on the merchandise was not to be calculated until B.T. Produce sold or otherwise disposed of the produce.[36] United States Department of Agriculture inspection certificate number K-678085-2, indicating serious damage to 18 percent of the load[37] was not inconsistent with Nat Taubenfeld's observations that the plums were very ripe. While David Oppenheimer and Company suggested that the price be $9 per box of plums, David Oppenheimer and Company agreed to an adjustment from $9 per box to $8 per box after factoring in the prices B.T. Produce was able to get for the plums (averaging $8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld's opinion, B.T. Produce suffered a net loss on the transaction.[38]

---

[34] RX A at 1; Tr. 1095.

[35] RX A at 1; Tr. 1095.

Another transaction is the June 14, 1999, United States Department of Agriculture inspection of cherries received by B.T. Produce from Northeast Trading, Inc.[39] Nat Taubenfeld indicated on the bill of lading that the cherries were "soft,"[40] as opposed to the firm cherries that customers desire.[41] Nat

---

[36] Tr. 1089.

[37] RX A at 6.

[38] RX A at 3; Tr. 1097-1100.

[39] RX Q.

[40] RX Q at 3.

[41] Tr. 1148.

Taubenfeld testified he received an average of $5.26 per box under the market price for these cherries and he received a $6 reduction from Northeast Trading, Inc., as a result. Nat Taubenfeld did not dispute United States Department of Agriculture inspection certificate number K-766717-3, which indicates the cherries had 21 percent defects.[42] Peter Silverstein, the president of Northeast Trading, Inc., testified that he had no indication there was anything wrong with United States Department of Agriculture inspection certificate number 766717-3 and the shipper did not appeal the inspection. He thought it was likely that the older cherries in this shipment were competing against younger and fresher cherries.[43]

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. Produce had a very flexible relationship and that sometimes, when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. Produce would be allowed to recoup a larger profit in a later transaction, to make up for a lesser profit or a loss for a different load.[44] Nat Taubenfeld pointed out that "the relationship between the shipper and us plays a tremendous role in our business[.]"[45] "[I]t's one hand washes the other. Sometimes you can make a few dollars more, and sometimes the shipper says that's what I can give you and that's what we do."[46] David Taubenfeld had a more dramatic explanation—"It's a lot of begging. There's a lot of begging to our customers and pleading and fighting over prices and things like that."[47] David Taubenfeld added that they often "worked for nothing" on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time.[48]

---

[42] Tr. 1150-54

[43] Tr. 1648-49.

[44] Tr. 1089-92.

[45] Tr. 1092.

Even though the Agricultural Marketing Service was unable to demonstrate that any particular United States Department of Agriculture inspection certificate was falsified to benefit B.T. Produce, the only probative evidence offered as to the purpose for William Taubenfeld's bribes was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as-needed basis. The portrayal by B.T. Produce of its shippers as satisfied with the results of United States Department of Agriculture inspections is belied by the significant number of reparation actions against B.T. Produce and approximately $500,000 in reparation payments by B.T. Produce generated by Operation Forbidden Fruit.[49] Certainly, even if produce which was expected by the shipper to be seconds or worse was falsely downgraded by the United States Department of

---

[46] Tr. 1100.

[47] Tr. 1795.

[48] Tr. 1936.

[49] Tr. 610-12.

Agriculture inspector, the shipper would have lower price expectations and the shipper would most likely view B.T. Produce as having done an apparently exceptional job of selling damaged goods, which view could inure to B.T. Produce's benefit in terms of future business.[50]

David Nielsen, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as to his role in the investigation of B.T. Produce. His methodology basically consisted of reviewing documents provided to the PACA Branch by the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General.[51] He examined the B.T. Produce PACA license files and the complaint history of B.T. Produce, as well as the documents that were supplied to him.[52] David Nielsen went to B.T. Produce's premises on March 26, 2001, as part of his investigation, particularly seeking out the purchase and sales records related to the United States Department of Agriculture inspection certificates that he had been given by the Federal Bureau of Investigation and the Office of the Inspector General. He spent about 2 weeks on site in March and April 2001, and returned for another 2 weeks several months later.[53] While Mr. Nielsen testified that he produced a report of investigation concluding that B.T. Produce violated the PACA by paying bribes to a United States Department of Agriculture inspector to falsify 42 United States Department of Agriculture inspection certificates, he based that conclusion on the documents he had received from the Federal Bureau of Investigation and the Office of the Inspector General. Mr. Nielsen admitted under cross-examination that B.T. Produce had no records indicating any evidence of falsification of United States Department of Agriculture inspection certificates and no records supporting a finding that B.T. Produce paid bribes.[54] Likewise, although David Nielsen stated in his report that the 42 United States Department of Agriculture inspection certificates were used to obtain price adjustments, his report was not accurate.[55] David Nielsen also admitted that in other areas the conclusions in his investigation report were not accurate[56] and that his statement in his investigation report about falsification was an assumption based on "my understanding of the information that I had been given."[57]

---

[50] Tr. 1302-06.

[51] Tr. 247.

[52] Tr. 252.

[53] Tr. 279.

---

[54] Tr. 284-87.

[55] Tr. 290-91.

[56] Specifically, Mr. Nielsen testified B.T. Produce made no adjustment on the produce B.T. Produce received from Trinity Fruit Sales Co., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX I; Tr. 308); B.T. Produce made no adjustment on the produce B.T. Produce received from Garden Fresh Distribution Services, Inc., even though his investigation report states a falsified United States Department of Agriculture inspection certificate was used to obtain an adjustment (RX G; Tr. 310); and B.T. Produce made no adjustment on the produce B.T. Produce received from Mission Produce, Inc., even though his investigation report states a falsified United States

John A. Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified as the Agricultural Marketing Service's sanctions witness. Mr. Koller testified that the payment of bribes by B.T. Produce "to a produce inspector, constitutes willful, repeated and flagrant violations of the PACA."[58] Mr. Koller further testified that bribing an inspector "corrupts the inspection process"[59] and violates the fair trade practices provision of the PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. Produce since William Taubenfeld was an officer and employee of B.T. Produce and since his actions were within the scope of his employment.[60] Mr. Koller pointed out that, when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions.[61]

Department of Agriculture inspection certificate was used to obtain an adjustment (RX T; Tr. 310).

[57] Tr. 321

[58] Tr. 490.

[59] Tr. 491.

[60] Tr. 491.

[61] RX QQ; Tr. 496-97.

Mr. Koller recommended that an appropriate sanction would be revocation of B.T. Produce's PACA license.[62] He stated that civil penalties were not appropriate here, because "bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and . . . the inspection process and its credibility."[63] Mr. Koller also stated revocation was warranted because of the length of time the bribery had continued and because "USDA has consistently recommended license revocation in the case of bribery. . . ."[64] Even in instances in which a bribe was paid and the particular United States Department of Agriculture inspection certificate was accurate, the bribe payer benefits, according to Mr. Koller, because the bribe payer could benefit at a later time[65] and because bribery creates an "unlevel playing field."[66] Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Agricultural Marketing Service was not able to identify a single one of the 42 United States Department of Agriculture inspections certificates that had been falsified.[67]

---

[62] Tr. 499.

[63] Tr. 502.

[64] Tr. 503.

[65] Tr. 516.

[66] Tr. 591.

[67] Tr. 533.

Findings of Fact

1. B.T. Produce is a New York corporation whose business and mailing address is 163-166 Row A, Hunts Point Terminal Market, Bronx, New York 10474. At all times pertinent to the instant proceeding, B.T. Produce was a PACA licensee.[68]

2. William J. Cashin was employed as a produce inspector by the United States Department of Agriculture, Agricultural Marketing Service, Fresh Products Branch, at the Hunts Point Terminal Market, New York, from July 1979 through August 1999.[69]

3. William Cashin participated in a scheme whereby he received bribes for the conduct of United States Department of Agriculture produce inspections. On March 23, 1999, William Cashin was arrested by agents of the Federal Bureau of Investigation and the United States Department of Agriculture's Office of the Inspector General. After his arrest, William Cashin entered into a cooperation agreement with the Federal Bureau of Investigation, agreeing to assist the Federal Bureau of Investigation with its investigation of bribery at Hunts Point Terminal Market.[70]

4. With the approval of the Federal Bureau of Investigation and the United States

---

[68] CX 1.

[69] Tr. 36.

[70] CX 5; Tr. 60-62.

Department of Agriculture's Office of the Inspector General, William Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. William Cashin surreptitiously recorded interactions with individuals at different produce houses using audio or audio-visual recording devices. At the end of each day, William Cashin gave the Federal Bureau of Investigation agents his tapes, gave the Federal Bureau of Investigation any bribes he received, and recounted his activities. The Federal Bureau of Investigation agents would prepare a FBI 302 report summarizing what William Cashin told them about that day's activities.[71]

5. Beginning in 1994, and more specifically, during the period March 24, 1999, through August 12, 1999, William Taubenfeld paid bribes to William Cashin. In particular, during the period March 24, 1999, through August 12, 1999, B.T. Produce, through William Taubenfeld, made the following payments to William Cashin, a United States Department of Agriculture produce inspector, in connection with 42 inspections of perishable agricultural commodities that B.T. Produce purchased, received, and accepted from 26 produce sellers in interstate or foreign commerce:

> a. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 24, 1999, inspection of apples shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on

---

[71] CX 6-CX 19; Tr. 61-62.

United States Department of Agriculture inspection certificate number K-678083-7.

b. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-678084-5.

c. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the March 24, 1999, inspection of plums shipped to B.T. Produce by David Oppenheimer and Company, reflected on United States Department of Agriculture inspection certificate number K-678085-2.

d. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the April 23, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-679809-4.

e. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 24, 1999, inspection of lettuce shipped to B.T. Produce by Sun America Produce, reflected on United States Department of Agriculture inspection certificate number K-765852-9.

f. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Deschino Produce & Imports, Inc., reflected on United States Department of Agriculture inspection certificate number K-765853-7.

g. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 24, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765854-5.

h. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 25, 1999, inspection of mangos shipped to B.T. Produce by Diazteca Company, Inc., reflected on United States Department of Agriculture inspection certificate number K-765859-4.

i. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 25, 1999, inspection of cherries shipped to B.T. Produce by Trinity Fruit Sales Co., reflected on United States Department of Agriculture inspection certificate number K-765860-2.

j. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 25, 1999, inspection of hashiya and persimmons shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-765861-0.

k. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the May 25, 1999, inspection of pears shipped to B.T. Produce by Victor Joseph & Son, Inc., reflected on United States Department of Agriculture inspection certificate number K-765863-6.

l. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 4, 1999, inspection of berries shipped to B.T. Produce by Fresh Harvest Int'l, reflected on United States Department of Agriculture inspection certificate number K-766504-5.

m. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 4, 1999, inspection of apples shipped to B.T. Produce by Dole Fresh Fruit Company, reflected on United States Department of Agriculture inspection certificate number K-766507-8.

n. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 10, 1999, inspection of papaya and mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766702-5.

o. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-766714-0.

p. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 14, 1999, inspection of onions shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United

States Department of Agriculture inspection certificate number K-766715-7.

q. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Primavera Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-766716-5.

r. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-766717-3.

s. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 14, 1999, inspection of cherries shipped to B.T. Produce by Sunniland Fruit, Inc., reflected on United States Department of Agriculture inspection certificate number K-766718-1.

t. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the June 14, 1999, inspection of mangos shipped to B.T. Produce by

Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-766719-9.

u. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-768355-0.

v. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768356-8.

w. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 8, 1999, inspection of mangos shipped to B.T. Produce by Mission Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768357-6.

x. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 8, 1999, inspection of nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768358-4.

y. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 14, 1999, inspection of plums and nectarines shipped to B.T. Produce by Wileman Bros. & Elliott, Inc., reflected on United States Department of Agriculture inspection certificate number K-768729-6.

z. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Paulmex International, Inc., reflected on United States Department of Agriculture inspection certificate number K-768730-4.

aa. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 14, 1999, inspection of mangos shipped to B.T. Produce by Mission Produce, Inc., reflected on United States Department of Agriculture inspection certificate number K-768731-2.

bb. B.T. Produce paid William Cashin, a United States Department of

Agriculture produce inspector, $50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768956-5.

cc. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 21, 1999, inspection of tomatoes shipped to B.T. Produce by JSG Trading Corp., reflected on United States Department of Agriculture inspection certificate number K-768957-3.

dd. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 21, 1999, inspection of limes shipped to B.T. Produce by Produce Plus, reflected on United States Department of Agriculture inspection certificate number K-768958-1.

ee. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 21, 1999, inspection of cherries and apples shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768959-9.

ff. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 21, 1999, inspection of mangos shipped to B.T. Produce by New Zealand Gourmet, reflected on United States Department of Agriculture inspection certificate number K-768960-7.

gg. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 21, 1999, inspection of cherries shipped to B.T. Produce by Northeast Trading, Inc., reflected on United States Department of Agriculture inspection certificate number K-768961-5.

hh. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Coast Tropical, reflected on United States Department of Agriculture inspection certificate number K-769369-3.

ii. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 30, 1999, inspection of mangos shipped to B.T. Produce by Tavilla Sales Co., reflected on United States Department of Agriculture inspection certificate number K-769397-1.

jj. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the July 30, 1999, inspection of pears shipped to B.T. Produce by Fruit Patch, Inc., reflected on United States Department of Agriculture inspection certificate number K-769398-9.

kk. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 3, 1999, inspection of mangos shipped to B.T. Produce by Garden Fresh Distribution Services, Inc., reflected on United States Department of Agriculture inspection certificate number K-769883-0.

ll. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 3, 1999, inspection of oranges shipped to B.T. Produce by Paul Steinberg Associates, reflected on United States Department of Agriculture inspection certificate number K-769884-8.

mm. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Dade South Fruits & Vegetables, Inc., reflected on United States Department of Agriculture inspection certificate number K-769899-6.

nn. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 6, 1999, inspection of plums shipped to B.T. Produce by Kingsburg Apple Sales, reflected on United States Department of Agriculture inspection certificate number K-769900-2.

oo. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 6, 1999, inspection of mangos shipped to B.T. Produce by Turino, reflected on United States Department of Agriculture inspection certificate number K-770151-9.

pp. B.T. Produce paid William Cashin, a United States Department of Agriculture produce inspector, $50 in connection with the August 9, 1999, inspection of tomatoes shipped to B.T. Produce by Quality First Marketing, Inc., reflected on United States Department of Agriculture inspection certificate number K-770160-0.[72]

6. During the period in which he paid bribes to William Cashin, William Taubenfeld was employed by, and was the secretary and a director of, B.T. Produce.[73]

---

[72] CX 6-CX 19; RX A-RX OO; Tr. 41-56, 58-59.

[73] CX 1; CX 20 at 71-75.

7. William Taubenfeld paid bribes to William Cashin with the expectation that William Cashin would downgrade the quality of the produce he was inspecting, on an as-needed basis, to benefit B.T. Produce.[74]

8. There is no evidence that any of the 42 United States Department of Agriculture inspection certificates cited in the Complaint were falsified.

9. B.T. Produce's position was improved by William Cashin's falsification of United States Department of Agriculture inspection certificates, on an as-needed basis, in exchange for bribes.[75]

10. On October 21, 1999, an indictment, in which the grand jury charged William Taubenfeld with 13 counts of bribery of a public official, in violation of 18 U.S.C. § 201(b), was filed in the United States District Court for the Southern District of New York. The indictment charges that William Taubenfeld:

> [U]nlawfully, wilfully, knowingly, directly and indirectly, did corruptly give, offer and promise things of value to a public official, with intent to influence official acts, to wit, WILLIAM TAUBENFELD, the defendant, made cash payments to a United States Department of Agriculture produce inspector in order to influence the

---

[74] RX QQ.

[75] Tr. 48-53, 58-59.

outcome of inspections of fresh fruit and vegetables conducted at B. T Produce Co., Inc., Hunts Point Terminal Market, Bronx, New York, as specified below:

COUNT	DATE	AMOUNT OF BRIBE
ONE	3/24/99	$150
TWO	4/23/99	$50
THREE	5/24/99	$150
FOUR	5/25/99	$200
FIVE	6/4/99	$100
SIX	6/14/99	$400
SEVEN	7/8/99	$200
EIGHT	7/14/99	$150
NINE	7/21/99	$300
TEN	7/30/99	$150
ELEVEN	8/3/99	$100
TWELVE	8/6/99	$150
THIRTEEN	8/12/99	$100

(Title 18, United States Code, Sections 201(b)(1)(A) and 2.)[76]

The bribes charged in the indictment cover the payments William Taubenfeld made to William Cashin in connection with the 42 inspections of perishable agricultural commodities identified in Finding of Fact 5.[77]

---

[76] CX 3.

[77] CX 6-CX 19.

11. On May 16, 2000, William Taubenfeld pled guilty to Count 8 of the indictment referred to in Finding of Fact 10. Specifically, William Taubenfeld pled guilty to bribery of a public official (18 U.S.C. § 201(b)). William Taubenfeld was sentenced to 15 months in prison, 3-years probation, and ordered to pay a $4,000 fine and $14,585 in restitution.[78]

12. During the period in which William Taubenfeld paid bribes to William Cashin, Nat Taubenfeld was the president and a director of B.T. Produce. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T. Produce, particularly in the area of buying and selling of produce.[79]

13. During the period in which William Taubenfeld paid bribes to William Cashin, Louis R. Bonino was the vice president, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce. Louis R. Bonino was involved in the day-to-day operations of B.T. Produce, principally managing the office aspect of operations.[80]

14. There is no evidence that Nat Taubenfeld or Louis R. Bonino knew William Taubenfeld was bribing William Cashin.

---

[78] CX 4.

[79] CX 1; RC-Taubenfeld 1; Tr. 700-01.

[80] CX 1.

Conclusions of Law

1. Payment of bribes to a United States Department of Agriculture produce inspector in connection with the inspection of produce constitutes a failure to perform an implied duty in connection with transactions involving perishable agricultural commodities in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

2. Pursuant to section 16 of the PACA (7 U.S.C. § 499p), William Taubenfeld's payment of bribes to a United States Department of Agriculture produce inspector constitutes violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by B.T. Produce.

3. B.T. Produce committed 42 willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by paying bribes to a United States Department of Agriculture produce inspector.

4. The appropriate sanction for B.T. Produce's 42 violations of the PACA is revocation of B.T. Produce's PACA license.

5. Louis R. Bonino was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Louis R. Bonino is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

6. Nat Taubenfeld was *responsibly connected*, as defined by section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)), with B.T. Produce when B.T. Produce violated the PACA. Accordingly, Nat Taubenfeld is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

Discussion

I. Introduction

I find William Taubenfeld, an officer and a director of B.T. Produce, paid bribes to William Cashin in each of the 42 instances alleged in the Complaint. I further find bribery of a United States Department of Agriculture produce inspector violates the PACA and B.T. Produce's violations were willful, flagrant, and repeated. I find B.T. Produce is liable for these violations. I further find, while there is no evidence that any of the 42 United States Department of Agriculture inspection certificates that are the subject of this proceeding were falsified, the evidence shows William Taubenfeld paid the bribes with the expectation that B.T. Produce would receive help from William Cashin in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis, and William Cashin actually provided B.T. Produce help in the form of falsified United States Department of Agriculture inspection certificates on an as-needed basis. I conclude the purposes of the PACA can best be achieved by the revocation of B.T. Produce's PACA license.

Therefore, Louis R. Bonino and Nat Taubenfeld are subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

II. B.T. Produce Violated the PACA

A. William Taubenfeld Bribed a USDA Inspector

The evidence clearly establishes that William Taubenfeld made $50 payments to William Cashin in the 42 instances alleged in the Complaint. While William Taubenfeld pled guilty to only a single count of bribery based on three inspections for which he paid bribes on July 14, 1999, William Cashin's undisputed testimony, as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that William Taubenfeld's bribing William Cashin was part of a long-standing practice. It is likewise undisputed that William Taubenfeld was the secretary and a director of B.T. Produce at the time the violations alleged in the Complaint were committed.

B. B.T. Produce Is Liable for William Taubenfeld's PACA Violations

Section 16 of the PACA (7 U.S.C. § 499p) states, in every case, the act of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall be deemed the act of the commission merchant, dealer, or broker. There is no disputing that William Taubenfeld paid bribes to William Cashin in connection with 42 inspections of perishable agricultural commodities and that the purpose for the bribes was to benefit B.T. Produce.

Section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.[81] As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, PACA violations committed by him are deemed to be violations by B.T. Produce.

Even if other officers, directors, and shareholders in B.T. Produce, as well as B.T. Produce's employees, were unaware of William Taubenfeld's PACA violations, the absence of actual knowledge is insufficient to rebut the burden imposed by section 16 of the PACA (7 U.S.C. § 499p). As a matter of law, PACA violations by an employee are violations by the PACA licensee, even if the PACA licensee's officers, directors, and owners had no actual knowledge of the violations and would not have condoned them.[82] If a PACA licensee can be held responsible for the acts of an employee, who was not an officer, a director, or an owner, even where the company's officers, directors, and owners had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is an officer and a director, whether or not the other officers and directors had actual knowledge of the violative conduct. The clear and specific language of the PACA would be defeated by any other interpretation.

---

[81] *In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___, slip op. at 24 (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 820 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[82] *In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___, slip op. at 25 (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 821 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

C. Bribery of a USDA Inspector Violates the PACA

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity received in interstate or foreign commerce. I have consistently interpreted this provision to hold that a payment of a bribe to a United States Department of Agriculture produce inspector in connection with a produce inspection is a violation of the PACA.[83] Both the United States Court of Appeals for the District of Columbia Circuit and the United States Court of Appeals for the

---

[83] *In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___(Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

Second Circuit have affirmed this interpretation.[84] A produce buyer's payment of bribes to a United States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

D. B.T. Produce's PACA Violations Were Willful, Flagrant, and Repeated

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.[85] William Taubenfeld, and therefore B.T. Produce, knew the payments to William Cashin in connection with the 42 inspections involved in this proceeding were illegal, but essentially decided that he needed to make these payments for the benefit of B.T. Produce's business. Clearly, B.T. Produce made a business decision to violate the PACA. B.T. Produce's payments to William Cashin were clearly intentional.

---

[84] *Coosemans Specialties, Inc. v. Department of Agric.*, No. 06-1199, 2007 WL 1029049 at *5 (D.C. Cir. Apr. 6, 2007); *G & T Terminal Packaging Co. v. U.S. Dep't of Agric.*, 468 F.3d 86, 96-97 (2d Cir. 2006).

Likewise, B.T. Produce's violations were flagrant. A violation of law is flagrant if it is conspicuously bad or objectionable or so bad that it can neither escape notice nor be condoned.[86] The payment of a bribe to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities is a conspicuously bad and objectionable act that cannot escape notice or be condoned because it undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificates and the integrity of the United States Department of Agriculture produce inspector. Here, where the purpose of the bribes undisputedly would be to benefit B.T. Produce to the detriment of its shippers, sellers, or growers, B.T. Produce's long-standing practice of bribing William Cashin easily meets the definition of flagrant under applicable case law.

---

[85] See, e.g., *Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. U.S. Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960).

[86] *In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___, slip op. at 30 (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802, 829 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

Moreover, I conclude, as a matter of law, B.T. Produce's violations of the PACA are repeated because repeated means more than one.[87] The Agricultural Marketing Service demonstrated that William Taubenfeld bribed William Cashin 42 times during the period March 1999 through August 1999, and that this practice had begun long before Operation Forbidden Fruit.

---

[87] *See, e.g., Allred's Produce v. U.S. Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir. 1999) (stating violations are repeated under the PACA if they are not done simultaneously); *Farley & Calfee v. U.S. Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding 51 violations of the payment provisions of the PACA fall plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Mktg. Serv.*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over $135,000 to be frequent violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving $19,059.08 occurring over 2½ months to be repeated); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding, because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA), *cert. denied*, 389 U.S. 835 (1967).

Thus, I conclude B.T. Produce committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

III. The Appropriate Sanction for B.T. Produce's Violations Is License Revocation

Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated a provision of section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture may publish the facts and circumstances of the violation, suspend the violator's PACA license, or assess a civil penalty. Further, if the violation is flagrant or repeated, the Secretary of Agriculture may revoke the PACA license of the offender.[88]

The Agricultural Marketing Service requests revocation of B.T. Produce's PACA license as an appropriate sanction for B.T. Produce's PACA violations. B.T. Produce, on the other hand, urges that, if I find it has violated the PACA, I assess B.T. Produce a civil penalty of $2,000 for each of the instances of bribery, for a total civil penalty of $84,000.

While the Agricultural Marketing Service failed to show any particular instance in which William Cashin falsified a United States

---

[88] 7 U.S.C. § 499h(a), (e).

Department of Agriculture inspection certificate as a result of the bribes he was paid by William Taubenfeld, the evidence establishes that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T. Produce and to the detriment of shippers, sellers, or growers. William Taubenfeld admitted in his plea that the purpose of the bribes was to get William Cashin to downgrade produce on occasion.

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993):

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

I have considered and discussed the nature of the violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. My views accord with those of John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, who testified that bribery of United States Department of Agriculture produce inspectors is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that the Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. Mr. Koller explained the Agricultural Marketing Service's recommendation for PACA license revocation as follows:

[BY MS. PARNES:]

Q. Are you aware of the sanctions that Complainant recommends in this case?

[BY MR. KOLLER:]

A. Yes, I am.

Q. How are you aware of it?

A. I have participated in the sanction recommendation, preparation of the sanction recommendation.

Q. What is that sanction recommendation?

A. A revocation of Respondent's PACA license.

Q. And what is the basis of this sanction recommendation?

A. There's several factors that are in consideration for this recommendation. One factor is that several bribery payments have been made in this case, and the evidence overwhelmingly shows that – the evidence overwhelming shows that Respondent, through William Taubenfeld made bribery payments to a produce inspector.

And the FBI has documented that 42 inspections, over a five-month period of time, have been affected by these bribery payments. As an aggravating factor, Mr. Cashin has already testified that he had been receiving bribery payments from Respondent as far back as 1994.

Another factor is that the trade relies on the inspection to be accurate and impartial, so they can use that inspection for resolving any disputes, and approximately 150,000 inspections are performed each year by the Fresh Products Branch, and it's important that these inspections that are performed are accurate.

If there's any suspicion that these inspections have been tainted by bribery payments made to a produce inspector to affect the outcome of that inspection is something of concern, or is a concern.

If when an inspection has been fraudulently obtained, this effects [sic] the overall inspection process. It undermines the inspection process, and it also effects [sic] the credibility of the inspection certificate as well, in terms of it being an impartial and accurate reflection of the quality and condition of the product.

And if there's any questions on the part of the shipper, as to the credibility of that inspection, this would effect [sic] the ability of resolving hundreds of disputes that could be resolved each day, as well as tons [sic] of thousands of dollars with illegal adjustments being – occurring in the transactions.

Another consideration or factor is the competitiveness. When you have someone who is paying bribes to a produce inspector, in order to get false information on the inspection, and price adjustments to the transaction, this provides an unfair advantage, and other wholesalers in the market, in order to compete, may feel that they have to make the bribery payments as well.

For example, if you have a wholesaler in the Hunts Point Market who is bribing a produce inspector to obtain false information and obtain price adjustments to the transaction, then other wholesalers on the market may well feel that in order to compete they will pay bribes to the inspectors as well.

Another consideration or another factor is that the Department strongly believes that a strong sanction will not only deter Respondent, but will deter other members of the industry from considering making or contemplating making a bribery payment to a produce inspector, and that is a serious violation, a serious violation in making these bribery payments.

Q. And does the fact that Mr. Cashin's [sic] a USDA employee and he was the one who was receiving the bribes, does that have any impact on the Complainant's sanction recommendation?

A. No.

Q. Why is that?

A. Complainant feels that bribery payments to a produce -- whether the bribery payments are made to another member of the industry or to a produce inspector, it is a serious violation. And the fact that bribery payments are being made to a produce inspector does not excuse a PACA licensee from making those bribery payments.

Q. Does Complainant recommend a civil penalty as an alternative to the license revocation in this case?

A. No.

Q. Why not?

A. In this case where you have bribery payments being made to a produce inspector to obtain false information on the inspection, that undermines the credibility of the inspection certificate itself, and these bribery payments, as well, undermine the inspection process and its credibility. And that is a serious violation, and that the appropriate -- and it would be appropriate for a civil penalty and the sanction imposed in this matter.

Another consideration is that the bribery payments did occur over a long period of time, and again, the competitiveness concern here, is that when you have bribery payments being made to a produce inspector, you know, it is an advantage to those who are making those bribery payments, and for those firms that are law abiding and not making those bribery payments, it's competitively hard for them to compete.

And another consideration here, is that bribery payments to a produce inspector are a serious violation of the PACA, and the appropriate sanction to deter this from occurring would be to have a license revocation on a licensee who has committed bribery payments.

And finally, it has been -- USDA has consistently recommended license revocation in the case of bribery and where these serious types of violations has occurred.

Tr. 499-503.

I find William Taubenfeld's payments of bribes to a United States Department of Agriculture produce inspector, within the scope of his employment, are deemed to be the actions of B.T. Produce and those bribes were so egregious that nothing less than PACA license revocation is an adequate sanction. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[89] While sanctions in similar cases are not required to be uniform,[90] I find no reason to depart from my normal practice of imposing the maximum sanction in this proceeding.

---

[89] *In re Coosemans Specialties, Inc.*, __ Agric. Dec. ___ (Apr. 20, 2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___ (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[90] *Harry Klein Produce Corp. v. U.S. Dep't of Agric.*, 831 F.2d 403, 407 (2d Cir. 1987); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1572 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999).

IV. Louis R. Bonino and Nat Taubenfeld Were Responsibly Connected

The term *responsibly connected* means affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association.[91] The record establishes Nat Taubenfeld was the president and a director of B.T. Produce during the period when B.T. Produce violated the PACA.[92] The record also establishes Louis R. Bonino was the vice president, a director, and a holder of 30 percent of the outstanding stock of B.T. Produce during the period when B.T. Produce violated the PACA.[93] The burden is on Louis R. Bonino and Nat Taubenfeld to demonstrate by a preponderance of the evidence that they were not responsibly connected with B.T. Produce despite their positions at, and ownership of, B.T. Produce.

Section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test which a petitioner must meet in order to demonstrate he or she was not responsibly connected. First, a petitioner must demonstrate by a preponderance of the evidence that he or she was not actively involved in the activities resulting in a violation of the PACA. If a petitioner satisfies the first prong, then for the second prong, the petitioner must demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners.

---

[91] 7 U.S.C. § 499a(b)(9).

[92] CX 1, CX 20 at 71-75.

[93] CX 1, CX 20 at 71-75.

The United States Department of Agriculture's standard for determining whether a petitioner was actively involved in the activities resulting in a violation of the PACA was first set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604, 610-11 (1999) (Decision and Order on Remand), as follows:

> The standard is as follows: A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

I find Louis R. Bonino and Nat Taubenfeld each carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce's violations of the PACA. However, I find Nat Taubenfeld failed to carry his burden of proof that he was only nominally an officer and a director of B.T. Produce. I also find Louis R. Bonino failed to carry his burden of proof that he was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce.

In order for a petitioner to demonstrate that he or she was only nominally an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation, the petitioner must demonstrate by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and shareholders, even though they may not actually have been actively involved in the activities resulting in violations of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and failed to counteract or obviate the fault of others.[94]

The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period. Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.[95] He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.[96] His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.[97] Nat Taubenfeld brought both of his sons into the business.[98]

---

[94] *Bell v. Department of Agric.*, 39 F.3d 1199, 1201 (D.C. Cir. 1994); *Minotto v. U.S. Dep't of Agric.*, 711 F.2d 406, 408-09 (D.C. Cir. 1983); *Quinn v. Butz*, 510 F.2d 743, 756 n.84 (D.C. Cir. 1975).

Nat Taubenfeld failed to meet his burden that he was only nominally the president and director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.[99]

---

[95] CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

[96] RC-Taubenfeld 6; Tr. 705-07, 721.

[97] Tr. 1281, 1298.

[98] Tr. 701-03.

[99] Tr. 669, 684, 1281, 1298.

Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.[100] Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.[101] Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.[102] Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.[103]

Louis R. Bonino failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, he had substantial responsibilities in many aspects of the business, and he had authority over employees. Moreover, Louis R. Bonino failed to meet his burden of proof that he was only nominally a holder of more than 10 percent of the outstanding stock of B.T. Produce.

---

[100] CX 1; RC-Bonino 1.

[101] Tr. 595, 605-06, 652-53.

[102] Tr. 633.

[103] Tr. 611-12.

Requests for Oral Argument

B.T. Produce, Nat Taubenfeld, and Louis R. Bonino request oral argument before the Judicial Officer. B.T. Produce's, Nat Taubenfeld's, and Louis R. Bonino's requests for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,[104] are refused because the parties have throughly briefed the issues and oral argument would appear to serve no useful purpose.

Appeal Petitions

B.T. Produce's Appeal Petition

B.T. Produce raises six issues in its appeal petition.[105] First, B.T. Produce contends the Chief ALJ's finding of fact number 8 is not supported by sufficient evidence.[106]

The Chief ALJ found "[t]he evidence supports a finding that there were transactions where B.T.'s position was improved by the falsification of inspections as a result of bribes paid to Cashin."[107] I agree with the Chief ALJ's finding and reject B.T.

---

[104] 7 C.F.R. § 1.145(d).

[105] B.T. Produce filed "Respondent's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R § 1.145(a) from the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006" [hereinafter B.T. Produce's Appeal Petition].

[106] B.T. Produce's Appeal Pet. at 2-5.

[107] Initial Decision at 18 (Finding of Fact 8).

Produce's contention that the Chief ALJ's finding is not supported by substantial evidence. William Cashin testified that, pursuant to his understanding with William Taubenfeld, he (Mr. Cashin) would "help" B.T. Produce on United States Department of Agriculture inspection certificates covering particular loads of produce in exchange for $50 payments. William Cashin testified he was paid for each inspection he conducted for B.T. Produce, and he would provide "help" 60 percent to 75 percent of the time.[108] William Cashin's testimony that he falsified United States Department of Agriculture inspection certificates issued in connection with the inspection of produce for B.T. Produce is corroborated by William Taubenfeld's guilty plea in which William Taubenfeld admitted he paid bribes to William Cashin to induce him to falsify United States Department of Agriculture inspection certificates.[109]

Nat Taubenfeld provided further testimony supporting William Cashin's testimony that he gave "help" to B.T. Produce. Nat Taubenfeld testified that, when B.T. Produce received produce, B.T. Produce would start selling the produce immediately, before William Cashin performed an inspection.[110] However, for every United States Department of Agriculture inspection certificate introduced as evidence, the amount of produce noted on the inspection certificate is the same as the full amount of produce received by B.T. Produce, as indicated by the bill of sale.[111] Nat Taubenfeld testified that he told William Cashin to write the original count on the United States Department of Agriculture inspection certificates even if some of the produce had already been sold and was therefore not inspected.[112]

---

[108] Tr. 44-60.

[109] CX 3, CX 4; RX QQ; Tr. 585.

[110] Tr. 1279, 1283.

Many of the United States Department of Agriculture inspection certificates for which William Taubenfeld paid bribes indicate the produce inspected contained serious defects. The payments B.T. Produce made to shippers for this produce reflect the defects indicated on the United States Department of Agriculture inspection certificates. However, in many cases, B.T. Produce sold the produce near market price,[113] at market price,[114] or above market price.[115] I find B.T. Produce's frequent ability to sell produce near, at, or above market prices suggests that the produce had fewer defects than stated on the United States Department of Agriculture inspection certificates and the United States Department of Agriculture inspection certificates were falsified.

---

[111] CX 7-CX 19; RX A-RX Z, RX AA-RX OO; Tr. 1283.

[112] Tr. 1284.

[113] RX A-RX B, RX D, RX F-RX J, RX N, RX SS.

[114] RX R, RX W-RX Y, RX LL, RX SS.

[115] RX E, RX II, RX SS; Tr. 1279-81.

Second, B.T. Produce contends the Agricultural Marketing Service failed to prove B.T. Produce violated the PACA because the Agricultural Marketing Service did not introduce any evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers.[116]

As discussed in this Decision and Order, *supra*, I disagree with B.T. Produce's contention that there is no evidence that William Taubenfeld's payments to William Cashin resulted in the falsification of United States Department of Agriculture inspection certificates or harm to B.T. Produce's shippers. However, even if I were to find no evidence of falsification of United States Department of Agriculture inspection certificates and no evidence of harm to B.T. Produce's shippers, I would still find William Taubenfeld's payments to a United States Department of Agriculture inspector violated section 2(4) of the PACA (7 U.S.C. § 499b(4)).

The PACA does not expressly provide that a payment to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities is a violation of the PACA. However, the PACA provides that it is unlawful for any commission merchant, dealer, or broker: (1) to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity; (2)

---

[116] B.T. Produce's Appeal Pet. at 6-21.

to fail or refuse truly and correctly to account and to make full payment promptly with respect to any transaction involving any perishable agricultural commodity; and (3) to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any transaction involving any perishable agricultural commodity.[117]

Bribery of a United States Department of Agriculture produce inspector, whatever the motive, in and of itself, negates, or gives the appearance of negating, the impartiality of the United States Department of Agriculture produce inspector and undermines the confidence that produce industry members and consumers place in quality and condition determinations rendered by the United States Department of Agriculture produce inspector. Commission merchants, dealers, and brokers have a duty to refrain from making payments to United States Department of Agriculture produce inspectors in connection with the inspection of perishable agricultural commodities which will or could undermine the trust produce sellers place in the accuracy of United States Department of Agriculture inspection certificates and the integrity of United States Department of Agriculture produce inspectors. A PACA licensee's payment to a United States Department of Agriculture produce inspector undermines the trust produce sellers place in the accuracy of the United States Department of Agriculture inspection certificate and the integrity of the United States Department of Agriculture produce inspector. I have consistently interpreted section 2(4) of the PACA (7 U.S.C. § 499b(4)) to prohibit payment of unlawful gratuities or bribes to United States Department of Agriculture produce inspectors.[118]

---

[117] 7 U.S.C. § 499b(4).

Third, B.T. Produce contends William Taubenfeld's payments to William Cashin were not within the scope of William Taubenfeld's employment with B.T. Produce; therefore, B.T. Produce did not violate the PACA.[119]

Generally, the factors considered to determine whether conduct of an employee or agent is within the scope of employment are: (1) whether the conduct is of the kind the employee or agent was hired to perform;[120] (2) whether the conduct occurs during working hours; (3) whether the conduct occurs on the employment premises; and (4) whether the conduct is actuated, at least in part, by a purpose to serve the employer or principal.[121]

---

[118] *In re Coosemans Specialties, Inc.*, __ Agric. Dec. ___ (Apr. 20, 2006), *aff'd*, No. 06-1199, 2007 WL 1029049 (D.C. Cir. Apr. 6, 2007); *In re Kleiman & Hochberg, Inc.*, __ Agric. Dec. ___ (Apr. 5, 2006), *appeal docketed*, No. 06-1283 (D.C. Cir. July 23, 2006); *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. 1869 (2005); *In re G & T Terminal Packaging Co.*, 64 Agric. Dec. 1839 (2005), *aff'd*, 468 F.3d 86 (2d Cir. 2006); *In re Post & Taback, Inc.*, 62 Agric. Dec. 802 (2003), *aff'd*, 123 F. App'x 406 (D.C. Cir. 2005).

[119] B.T. Produce's Appeal Pet. at 19-21

[120] Rarely will an employee's or agent's egregious act, such as the payment of a bribe, be conduct of the kind the employee or agent was hired to perform. However, the appropriate inquiry is whether the employee's or agent's egregious act was committed while performing, or in connection with, his or her job responsibilities.

The record establishes that William Taubenfeld was within the scope of his employment with B.T. Produce when he paid bribes to William Cashin. William Taubenfeld paid bribes to William Cashin at B.T. Produce's place of business, during regular working hours, and in connection with the inspection of perishable agricultural commodities purchased, received, and accepted by B.T. Produce. William Taubenfeld was authorized to apply for United States Department of Agriculture inspections of perishable agricultural commodities and the bribes William Taubenfeld paid to William Cashin were intended to benefit B.T. Produce.[122] Therefore, I find William Taubenfeld was acting within the scope of his employment when he paid William Cashin.

Fourth, B.T. Produce contends the Agricultural Marketing Service failed to provide B.T. Produce with notice and an opportunity to achieve compliance with the PACA prior to instituting the disciplinary action against B.T. Produce on August 16, 2002, in violation of the Administrative Procedure Act.[123]

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the licensee must be given notice of facts warranting revocation and an opportunity to achieve compliance, except in cases of willfulness, as follows:

---

[121] *See generally* Restatement (Second) of Agency § 228 (1958).

[122] Tr. 44-52.

[123] B.T. Produce's Appeal Pet. at 21-27.

> **§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**
>
> . . . .
>
> (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given–
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

5 U.S.C. § 558(c).

A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute.[124] The record establishes that William Taubenfeld intentionally made unlawful payments to William Cashin in connection with produce inspections, and thereby acted willfully. Therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is inapposite.

B.T. Produce argues that, while William Taubenfeld willfully violated the PACA, William Taubenfeld's willfulness cannot be imputed to B.T. Produce; therefore, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is applicable to B.T. Produce.[125]

I disagree with B.T. Produce's contention that William Taubenfeld's willful violations of the PACA cannot be imputed to B.T. Produce. The relationship between a commission merchant, dealer, or broker and its employees, acting within the scope of their employment, is governed by section 16 of the PACA (7 U.S.C. § 499p) which unambiguously provides that, in construing and enforcing the PACA, the act of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall *in every case* be deemed the act of the commission merchant, dealer, or broker as that of the agent, officer, or other person. Essentially, section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees.

---

[124] See note 85.

[125] B.T. Produce's Appeal Pet. at 23.

B.T. Produce's employee, secretary, and director, William Taubenfeld, was acting within the scope of employment when he knowingly and willfully bribed William Cashin. Thus, as a matter of law, the knowing and willful violations by William Taubenfeld are deemed to be knowing and willful violations by B.T. Produce, even if B.T. Produce's other officers and directors had no actual knowledge of the bribery and would not have condoned the bribery had they known of it.[126] The United States Court of Appeals for the Sixth Circuit addressed the issue of identity of action between a corporate PACA licensee and the corporate PACA licensee's employees in a case involving alterations of United States Department of Agriculture inspection certificates by employees of a corporate PACA licensee, as follows:

> MacClaren also claims that the Secretary failed to consider all relevant circumstances before deciding to revoke

---

[126] *H.C. MacClaren, Inc. v. U.S. Dep't of Agric.*, 342 F.3d 584, 591 (6th Cir. 2003); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 790 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re The Produce Place*, 53 Agric. Dec. 1715, 1761-63 (1994); *In re Jacobson Produce, Inc.* (Decision as to Jacobson Produce, Inc.), 53 Agric. Dec. 728, 754 (1994), *appeal dismissed*, No. 94-4418 (2d Cir. Apr. 16, 1996).

its license. MacClaren complains that the sanction of license revocation falls exclusively on Gregory MacClaren and Darrell Moccia, while Olds and Gottlob are not subject to any penalty. The sanction, however, falls entirely on MacClaren as a company. Furthermore, because Olds, Gottlob and Johnston were acting within the scope of their employment when they knowingly and willfully violated PACA, their knowing and willful violations are deemed to be knowing and willful violations by MacClaren. Under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person." 7 U.S.C. § 499p. According to the Sixth Circuit, acts are "willful" when "knowingly taken by one subject to the statutory provisions in disregard of the action's legality." *Hodgins v. United States Dep't of Agric.*, No. 97-3899, 2000 WL 1785733 (6th Cir. Nov. 20, 2000) (quotation omitted). "Actions taken in reckless disregard of statutory provisions may also be considered 'willful.'" *Id.* (quotation and citations omitted). The MacClaren employees

> admitted to altering USDA inspection certificates and issuing false accounts of sale in knowing disregard of their actions' legality. Accordingly, their willful violations are deemed willful violations by MacClaren.

H.C. MacClaren, Inc. v. U.S. Dep't of Agric., 342 F.3d 584, 591 (6th Cir. 2003).

Similarly, in *Koam Produce, Inc. v. DiMare Homestead, Inc.*, 329 F.3d 123 (2d Cir. 2003), the Court found that bribes made by a produce wholesaler's employee to a United States Department of Agriculture inspector to induce the inspector to falsify United States Department of Agriculture inspection certificates are, under the PACA, deemed the acts of the produce wholesaler, as follows:

> Lastly, we address Koam's equitable argument that our failure to find in its favor would penalize Koam "simply because USDA sent a corrupt inspector to perform the inspection (a decision over which Koam had no control) at the time that Koam was employing a faithless employee [Friedman] (who played no role in any of the DiMare inspections)." . . . We view the equities differently from Koam, as its argument distorts the facts in at least three ways. . . . Third, Koam's attempt to distance itself from Friedman's criminality fails. Friedman

> was hardly a "faithless servant," since only Koam, not Friedman, stood to benefit from his bribes. Regardless, under PACA, "the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker . . . ." 7 U.S.C. § 499p. Thus, Friedman's acts--bribing USDA inspectors--are deemed the acts of Koam.

Koam Produce, Inc. v. DiMare Homestead, Inc., 329 F.3d 123, 129-30 (2d Cir. 2003).

Therefore, I conclude section 16 of the PACA (7 U.S.C. § 499p) provides an identity of action between a PACA licensee and the PACA licensee's agents and employees and William Taubenfeld's willful violations of the PACA are B.T. Produce's willful violations of the PACA. Consequently, the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) is not applicable to B.T. Produce.

Fifth, B.T. Produce contends the Chief ALJ's construction of section 16 of the PACA (7 U.S.C. § 499p) unconstitutionally makes B.T. Produce liable for William Taubenfeld's payments to William Cashin, where B.T. Produce, even with the exercise of the utmost supervision, could not discover or control William Taubenfeld's activities.[127]

B.T. Produce does not cite any authority in support of its position that a corporation's liability for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional. Section 16 of the PACA (7 U.S.C. § 499p) unambiguously provides that the act, omission, or failure of any agent, officer, or other person acting for or employed by a commission merchant, dealer, or broker, within the scope of his or her employment or office, shall, in every case, be deemed the act, omission, or failure of the commission merchant, dealer, or broker. Liability under section 16 of the PACA (7 U.S.C. § 499p) attaches even where the corporate PACA licensee did not condone or even know of the PACA violations of its agents, officers, or employees,[128] and I am unable to locate any case holding the imposition of liability under section 16 of the PACA (7 U.S.C. §

---

[127] B.T. Produce's Appeal Pet. at 27-29, 35-40.

[128] *In re KOAM Produce,* 128 *Inc.,* __ Agric. Dec. ___, slip op. at 22 (June 2, 2006) (holding KOAM Produce, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at KOAM Produce, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector), *appeal docketed,* No. 06-4838 (2d Cir. Oct. 19, 2006); *In re M. Trombetta & Sons, Inc.,* 64 Agric. Dec. 1869, 1886-87 (2005) (holding M. Trombetta & Sons, Inc., liable for its employee's payment of bribes to a United States Department of Agriculture inspector, even though the evidence failed to prove that anyone else at M. Trombetta & Sons, Inc., knew the employee was illegally paying money to the United States Department of Agriculture inspector).

499p) is unconstitutional. Therefore, I reject B.T. Produce's unsupported contention that holding a corporation liable for the acts, omissions, or failures of its agents, officers, and employees is unconstitutional.

Sixth, B.T. Produce contends the Agricultural Marketing Service's construction of section 16 of the PACA (7 U.S.C. § 499p) creates an unconstitutional irrebuttable presumption that B.T. Produce is liable for William Taubenfeld's payments to William Cashin.[129]

Section 16 of the PACA (7 U.S.C. § 499p) does not create an irrebuttable presumption, as B.T. Produce asserts. B.T. Produce could avoid liability under the PACA for William Taubenfeld's bribery either by showing William Taubenfeld was not acting for, or employed by, B.T. Produce at the time he bribed William Cashin or by showing that William Taubenfeld's bribes were not made within the scope of his employment or office. Therefore, I reject B.T. Produce's contention that B.T. Produce was irrebuttably presumed to be liable for William Taubenfeld's bribery.

---

[129] B.T. Produce's Appeal Pet. at 29-35.

Louis R. Bonino's and Nat Taubenfeld's Appeal Petitions

Louis R. Bonino and Nat Taubenfeld raise six issues in their appeal petitions.[130] First, Louis R. Bonino and Nat Taubenfeld contend they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.[131]

The Chief ALJ found Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.[132]As discussed in this Decision and Order, I agree with the Chief ALJ's finding and Louis R. Bonino's and Nat Taubenfeld's contentions that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA.

---

[130] Louis R. Bonino filed "Petitioner Louis R. Bonino's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, *As Modified*, February 6, 2006" [hereinafter Bonino's Appeal Petition]. Nat Taubenfeld filed "Petitioner Nat Taubenfeld's Appeal Petition to the Judicial Officer Pursuant to 7 C.F.R. § 1.145(a) for the Decision and Order of the Honorable Marc R. Hillson, C.A.L.J., Dated December 6, 2005, As Modified, February 6, 2006" [hereinafter Taubenfeld's Appeal Petition].

[131] Bonino's Appeal Pet. at 2-3; Taubenfeld's Appeal Pet. at 2-5.

[132] Initial Decision at 30-32.

Second, Louis R. Bonino contends the record is bereft of any evidence that B.T. Produce was operating as the alter ego of Louis R. Bonino.[133]

The second prong of the two-prong responsibly connected test requires a petitioner to demonstrate by a preponderance of the evidence one of two alternatives: (1) the petitioner was only nominally a partner, an officer, a director, or a shareholder of the violating PACA licensee or entity subject to a PACA license; or (2) the petitioner was not an owner of the violating PACA licensee or entity subject to a PACA license, which was the alter ego of its owners. The record establishes Louis R. Bonino was an owner of B.T. Produce; therefore, the defense that Louis R. Bonino was not an owner of B.T. Produce, which was the alter ego of its owners, is not available to Louis R. Bonino.[134]

---

[133] Bonino's Appeal Pet. at 4.

[134] *In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 14 (Sept. 28, 2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, __ Agric. Dec. ___, slip op. at 9 (July 26, 2006); *In re James E. Thames, Jr.* (Decision as to James E. Thames, Jr.), __ Agric. Dec. ___, slip op. at 11 (Jan. 24, 2006), *aff'd per curiam*, 195 F. App'x 850 (11th Cir. 2006); *In re Benjamin Sudano*, 63 Agric. Dec. 388, 411 (2004), *aff'd per curiam*, 131 F. App'x 404 (4th Cir. 2005); *In re Anthony L. Thomas*, 59 Agric. Dec. 367, 390 (2000), *aff'd*, No. 00-1157 (D.C. Cir. Jan. 30, 2001); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

Third, Louis R. Bonino and Nat Taubenfeld contend they were nominal officers of B.T. Produce.[135]

In order for a petitioner to show that he or she was only nominally an officer, a director, and a holder of more than 10 percent of the outstanding stock of a corporation or association, the petitioner must show by a preponderance of the evidence that he or she did not have an actual, significant nexus with the violating company during the violation period. Under the actual, significant nexus standard, responsibilities are placed upon corporate officers, directors, and stockholders, even though they may not actually have been actively involved in the activities resulting in a violation of the PACA, because their status with the company requires that they knew, or should have known, about the violations being committed and they failed to counteract or obviate the fault of others.[136] The record establishes Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce during the violation period.

During the period when B.T. Produce violated the PACA, Louis R. Bonino owned 30 percent of the outstanding stock of B.T. Produce. Louis R. Bonino's ownership of a substantial percentage of stock alone is very strong evidence that he was not a nominal shareholder.[137] Louis R. Bonino has not demonstrated by a preponderance of the evidence that he was only a nominal shareholder of B.T. Produce.

---

[135] Bonino's Appeal Pet. at 4-5; Taubenfeld's Appeal Pet. at 5-6.

[136] See note 94.

A person's active participation in corporate decision-making is an important factor in the determination that the person was not merely a nominal corporate officer and director.[138] Louis R. Bonino was an officer, a director, and a holder of more than 10 percent of the outstanding stock of B.T. Produce since he co-founded B.T. Produce with Nat Taubenfeld in 1990.[139] Louis R. Bonino was directly involved in the day-to-day operations of B.T. Produce running the office side of the business.[140] Louis R. Bonino's responsibilities included signing checks; handling cash; signing contracts; hiring, firing, and training employees; and overseeing security. He personally was present at B.T. Produce's business address 3 to 4 days a week.[141] Louis R. Bonino directly handled reparation complaints filed against B.T. Produce.[142]

---

[137] *Siegel v. Lyng*, 851 F.2d 412, 417 (D.C. Cir. 1988) (stating this court has held, most clearly in *Martino*, that approximately 20 percent stock ownership would suffice to make a person accountable for not controlling delinquent management); *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 611 (D.C. Cir. 1987) (stating with approval, in *Martino*, we found ownership of 22.2 percent of the violating company's stock was enough support for a finding of responsible connection); *Martino v. U.S. Dep't of Agric.*, 801 F.2d 1410, 1414 (D.C. Cir. 1986) (holding ownership of 22.2 percent of the stock of a company formed a sufficient nexus to establish the petitioner's responsible connection to the company); *In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 21 (Nov. 8, 2006) (stating Congress' utilization of ownership of more than 10 percent of the outstanding stock of a corporation as sufficient to trigger the presumption that the owner was substantially connected is a strong indication that a 331/3 percent owner does not serve in a nominal capacity), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Joseph T. Kocot*, 57 Agric. Dec. 1517, 1544-45 (1998) (stating the petitioner's ownership of a substantial percentage of the outstanding stock of the violating company alone is very strong evidence that the petitioner was not a nominal shareholder); *In re Steven J. Rodgers*, 56 Agric. Dec. 1919, 1956 (1997) (stating the petitioner's ownership of 33.3 percent of the outstanding stock of the violating entity alone is very strong evidence that the petitioner was responsibly connected with the violating entity), *aff'd per curiam*, 172 F.3d 920, 1998 WL 794851 (D.C. Cir. 1998) (Table), printed in 57 Agric. Dec. 1464 (1998).

Nat Taubenfeld is the co-founder of B.T. Produce and has been the president, a director, and the individual in charge of the produce end of B.T. Produce since its inception.[143] He has participated in the day-to-day management of B.T. Produce from the day he co-founded it, principally running the night shift, buying and selling produce. Nat Taubenfeld communicated to B.T. Produce personnel how he expected them to conduct B.T. Produce's business, had a role in hiring and firing personnel, and signed checks.[144] His role included requesting inspections from United States Department of Agriculture inspectors and seeking and obtaining price adjustments based on the results of inspections.[145] Nat Taubenfeld brought both of his sons into the business.[146]

---

[138] *In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 32 (Nov. 8, 2006), *appeal docketed*, No. 07-70033 (9th Cir. Jan. 4, 2007); *In re Donald R. Beucke*, __ Agric. Dec. ___, slip op. at 25 (Sept. 28, 2006), *appeal docketed*, No. 06-75358 (9th Cir. Dec. 1, 2006); *In re Edward S. Martindale*, __ Agric. Dec. ___, slip op. at 30 (July 26, 2006); *In re Lawrence D. Salins*, 57 Agric. Dec. 1474, 1494 (1998).

[139] CX 1; RC-Bonino 1

[140] Tr. 595, 605-06, 652-53.

[141] Tr. 633.

[142] Tr. 611-12.

[143] CX 1; RC-Taubenfeld 1; Tr. 678-80, 684, 698-701, 716-17.

Nat Taubenfeld failed to meet his burden that he was only nominally the president and a director of B.T. Produce, as it is clear that he was intimately involved in the day-to-day workings of B.T. Produce, that he was considered by company personnel to be the head of B.T. Produce, and that he was involved in many or most of the decisions involving the produce end of B.T. Produce.[147]

Louis R. Bonino and Nat Taubenfeld each failed to meet his burden that he was only nominally an officer and a director of B.T. Produce, as it is clear that Louis R. Bonino and Nat Taubenfeld were intimately involved in the day-to-day workings of B.T. Produce, they each had substantial responsibilities in many aspects of the business, and they had authority over employees. In short, I find Louis R. Bonino and Nat Taubenfeld each had an actual, significant nexus with B.T. Produce.

---

[144] RC-Taubenfeld 6; Tr. 705-07, 721.

[145] Tr. 1281, 1298.

[146] Tr. 701-03.

[147] Tr. 669, 684, 1281, 1298.

Fourth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their right under Bonino's the Administrative Procedure Act to notice and opportunity to demonstrate or achieve compliance with the PACA.[148]

The Administrative Procedure Act provides, before institution of agency proceedings for revocation of a license, the *licensee* must be given notice of facts warranting revocation and an opportunity to demonstrate or achieve compliance with all lawful requirements, except in cases of willfulness.[149] Neither Louis R. Bonino nor Nat Taubenfeld is a PACA licensee. The responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, concern merely the determinations that Louis R. Bonino and Nat Taubenfeld were responsibly connected with B.T. Produce when B.T. Produce violated the PACA; they do not concern the withdrawal, suspension, revocation, or annulment of a PACA license held by

---

[148] Appeal Pet. at 6-10; Taubenfeld's Appeal Pet. at 19-22.

[149] 5 U.S.C. § 558(c).

Louis R. Bonino or Nat Taubenfeld. Therefore, with respect to the responsibly connected proceedings, *In re Louis R. Bonino*, PACA Docket No. APP-03-0009, and *In re Nat Taubenfeld*, PACA Docket No. APP-03-0011, I find the Administrative Procedure Act provision relating to notice and opportunity to demonstrate or achieve compliance (5 U.S.C. § 558(c)) inapposite.

Fifth, Louis R. Bonino and Nat Taubenfeld contend the imposition of employment restrictions based on finding them responsibly connected with B.T. Produce during the period when B.T. Produce violated the PACA would violate their rights under the due process clause of the Fifth Amendment to the Constitution of the United States.[150]

Individuals found to be responsibly connected with a commission merchant, dealer, or broker, when that commission merchant, dealer, or broker violates section 2 of the PACA (7 U.S.C. § 499b), are subject to employment restrictions under section 8(b) of the PACA (7 U.S.C. § 499h(b)). Under the rational basis test, a statute is presumed to be valid and will be sustained if the statute is rationally related to a legitimate state interest.[151]

---

[150] Bonino's Appeal Pet. at 6-10, 14-18; Taubenfeld's Appeal Pet. at 6-9, 14-19.

[151] *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

The PACA is designed to protect growers and shippers of perishable agricultural commodities from unfair practices by commission merchants, dealers, and brokers.[152] Section 8(b) of the PACA (7 U.S.C. § 499h(b)), which imposes employment restrictions on persons responsibly connected with commission merchants, dealers, and brokers who violate section 2 of the PACA (7 U.S.C. § 499b), is rationally related to the legitimate governmental objective of the protection of producers and shippers of perishable agricultural commodities. The status of being an officer, a director, or a holder of more than 10 percent of the outstanding stock of a commission merchant, dealer, or broker that has violated section 2 of the PACA (7 U.S.C. § 499b) forms a sufficient nexus to the violating commission merchant, dealer, or broker so that an officer, a director, or a holder of more than 10 percent of the outstanding stock may be deemed *responsibly connected* and subject to employment sanctions in the PACA.[153] Since the restriction on the employment of *responsibly connected* individuals is rationally related to the purpose of the PACA, section 8(b) of the PACA (7 U.S.C. § 499h(b)) does not unconstitutionally encroach on Louis R. Bonino's or Nat Taubenfeld's due process rights by arbitrarily interfering with their chosen occupations.

Contrary to Louis R. Bonino's and Nat Taubenfeld's position, the Fifth Amendment to the Constitution of the United States does not guarantee an unrestricted privilege to engage in a particular occupation.[154] A number of courts have rejected constitutional challenges to the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) imposed on individuals found to be responsibly connected with PACA violators.[155]

---

[152] H.R. Rep. No. 1041 (1930).

[153] *Birkenfield v. United States*, 369 F.2d 491, 494-95 (3d Cir. 1966).

Sixth, Louis R. Bonino and Nat Taubenfeld assert the irrebuttable presumption that they were responsibly connected with B.T. Produce is unconstitutional.[156]

---

[154] *Nebbia v. People of State of New York*, 291 U.S. 502, 527-28 (1934); *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125, 1133 (5th Cir. 1993); *Zwick v. Freeman*, 373 F.2d 110, 118 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967).

[155] *Hawkins v. Agricultural Mktg. Serv.*, 10 F.3d 1125 (5th Cir. 1993) (holding the restriction in the PACA upon the employment of persons responsibly connected with a licensee found to have violated the PACA does not violate the due process right to engage in occupations of one's choosing); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988 (2d Cir.) (holding section 8(b) of the PACA (7 U.S.C. § 499h(b)), restricting persons determined to be responsibly connected with a PACA licensee that has committed flagrant or repeated violations of the PACA, does not violate the due process right to engage in a chosen occupation), *cert. denied*, 419 U.S. 830 (1974); *Zwick v. Freeman*, 373 F.2d 110 (2d Cir.) (rejecting the petitioner's claim that the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) violate the petitioner's right to earn a livelihood in the common occupations of the community; concluding the employment restrictions in section 8(b) of the PACA (7 U.S.C. § 499h(b)) are reasonably designed to achieve the congressional purpose of the PACA), *cert. denied*, 389 U.S. 835 (1967); *Birkenfield v. United States*, 369 F.2d 491 (3d Cir. 1966) (stating the exclusion of persons responsibly connected with a PACA licensee, who failed to pay a reparation award, from employment in the field of marketing perishable agricultural commodities, is not unconstitutional).

I disagree with Louis R. Bonino's and Nat Taubenfeld's assertion that they are irrebuttably presumed to have been responsibly connected with B.T. Produce when B.T. Produce violated the PACA. Under the PACA, an individual who is affiliated or connected with a commission merchant, dealer, or broker as a partner in a partnership or as an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association is presumed to be responsibly connected with that commission merchant, dealer, or broker. However, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides that a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected. Specifically, section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) provides a two-prong test by which a partner in a partnership or an officer, a director, or a holder of more than 10 percent of the outstanding stock of a corporation or association may rebut the presumption that he or she is responsibly connected with the commission merchant, dealer, or broker. As discussed in this Decision and Order, *supra*, Louis R. Bonino and Nat Taubenfeld failed to prove by a preponderance of the evidence that they met the second prong of the two-prong test.

---

[156] Bonino Appeal Pet. at 10-14; Taubenfeld Appeal Pet. at 6-14.

The Agricultural Marketing Service's and the Chief's Appeal Petition

The Agricultural Marketing Service and the Chief raise three issues in "Complainant's and Respondent's Appeal of the Decision and Order" [hereinafter the Agricultural Marketing Service's and the Chief's Appeal Petition]. First, the Agricultural Marketing Service and the Chief contend the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture's sanction policy or United States Department of Agriculture precedent and the Chief ALJ erroneously took collateral effects of the revocation of B.T. Produce's PACA license into account when determining the sanction to be imposed upon B.T. Produce. The Agricultural Marketing Service and the Chief urge that I revoke B.T. Produce's PACA license.[157]

I agree with the Agricultural Marketing Service and the Chief that the sanction imposed by the Chief ALJ against B.T. Produce is not in accord with the United States Department of Agriculture's sanction policy set forth in *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476, 497 (1991), or United States Department of Agriculture precedent.

I have considered and discussed the nature of B.T. Produce's PACA violations as they relate to the purposes of the PACA and the various circumstances that I believe are relevant to an appropriate sanction. I find the nature of B.T. Produce's violations, as they relate to the purposes of the PACA, justify revocation of B.T. Produce's PACA license. In addition, the Agricultural Marketing Service, the agency charged with the responsibility for achieving the congressional purpose of the PACA, recommends the imposition of license revocation as the appropriate sanction for B.T. Produce's PACA violations. John Koller, a senior marketing specialist employed by the PACA Branch, Agricultural Marketing Service, United States Department of Agriculture, testified that bribery of a United States Department of Agriculture produce inspector is such a serious violation of the PACA that a severe sanction is necessary as a deterrent and that them Agricultural Marketing Service recommends PACA license revocation as the only adequate sanction. After examining the relevant circumstances and the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the PACA, I conclude revocation of B.T. Produce's PACA license is in accord with the United States Department of Agriculture's sanction policy and the sanction imposed by the Chief ALJ is not in accord with the United States Department of Agriculture's sanction policy.

---

[157] The Agricultural Marketing Service's and the Chief's Appeal Pet. at 11-23.

Moreover, the Chief ALJ's assessment of a $360,000 civil penalty, in lieu of a 90-day suspension of B.T. Produce's PACA license, is not in accord with United States Department of Agriculture precedent. In every previous case that has come before me in which a PACA licensee has paid bribes or illegal gratuities to a United States Department of Agriculture produce inspector in connection with the inspection of perishable agricultural commodities in violation of the PACA, I imposed the maximum sanction of either licence revocation or publication of the facts and circumstances of the violations.[158]

Further still, the Chief ALJ's reliance on collateral effects of the revocation of B.T. Produce's PACA license, when determining the sanction to be imposed upon B.T. Produce, is error. The Chief ALJ states, when determining the sanction to impose on B.T. Produce, he considered collateral effects of license revocation on B.T. Produce's employees, as follows:

> In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent's employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose their jobs, and the fact that the significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an impact on company ownership than its non-culpable employees.

Initial Decision at 27-28. However, collateral effects of a respondent's PACA license revocation are neither relevant to a determination whether a respondent violated section 2(4) of the PACA (7

---

[158] See note 89.

U.S.C. § 499b(4)) nor relevant to the sanction to be imposed for violating section 2(4) of the PACA (7 U.S.C. § 499b(4)). The Secretary of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's employees.[159] The adverse impact of license revocation on B.T. Produce's employees is unfortunate, but it is not relevant to this proceeding.

---

[159] *In re JSG Trading Corp.* (Order Denying Pet. for Recons.), 57 Agric. Dec. 710, 728 (1998) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the effect a sanction may have on a respondent's customers, community, or employees); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1903 (1997) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees and the effect of revocation of the respondent's PACA license on employment of 30 persons and on small and medium-sized businesses which rely on respondent is irrelevant), *aff'd*, 178 F.3d 743 (5th Cir.), *reprinted in* 58 Agric. Dec. 991, *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 941 (1997) (holding the harm suffered by the respondent's 25 employees from a sanction other than a civil penalty is a collateral effect which is not relevant to the sanction to be imposed), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 557, 564 (1989) (stating hardship to a respondent's community, customers, or employees which might result from a disciplinary order is given no weight in determining the sanction); *In re Harry Klein Produce Corp.*, 46 Agric. Dec. 134, 171 (1987) (stating the United States Department of Agriculture routinely denies requests for a lenient sanction based on the interests of a respondent's customers, community, or employees), *aff'd*, 831 F.2d 403 (2d Cir. 1987).

Second, the Agricultural Marketing Service and the Chief state, assuming for the sake of argument that a civil penalty is the appropriate sanction in this proceeding, the Chief ALJ did not correctly apply the formula mandated by the PACA to arrive at the $360,000 civil penalty the Chief ALJ assessed against B.T. Produce. The Agricultural Marketing Service and the Chief contend, if a civil penalty were appropriate, B.T. Produce should be assessed a civil penalty of at least $3,650,000.[160]

I conclude revocation of B.T. Produce's PACA license is warranted in law and justified by the facts. Therefore, I find no purpose would be served by addressing the methodology used by the Chief ALJ to determine the amount of the civil penalty which he assessed against B.T. Produce or the amount of the civil penalty which the Chief ALJ should have assessed against B.T. Produce had a civil penalty been an appropriate sanction.

Third, the Agricultural Marketing Service and the Chief contend the Chief ALJ's finding that Louis R. Bonino and Nat Taubenfeld were not actively involved in the activities resulting in B.T. Produce's violations of the PACA, is error.[161]

I agree with the Chief ALJ that Louis R. Bonino and Nat Taubenfeld demonstrated by a preponderance of the evidence that they were not actively involved in the activities resulting in B.T. Produce's violations of the PACA. In their appeal petition, the Agricultural Marketing Service and the Chief cite portions of the record which establish that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce. While I find that Louis R. Bonino and Nat Taubenfeld were actively involved in the day-to-day management of B.T. Produce, I reject the Agricultural Marketing Service's and the Chief's suggestion that an individual's active involvement in day-to-day management is, by itself, sufficient to establish that the individual was also actively involved in the activities resulting in a violation of the PACA. I find Louis R. Bonino and Nat Taubenfeld, although actively involved in the day-to-day management of B.T. Produce, proved by a preponderance of the evidence that they were not actively involved in activities resulting in B.T. Produce's violations of the PACA.

---

[160] The Agricultural Marketing Service's and the Chief's Appeal Pet. at 23-24.

[161] The Agricultural Marketing Service's and the Chief's Appeal Pet. at 24-28.

The Agricultural Marketing Service and the Chief also contend Louis R. Bonino was actively involved in the activities resulting in B.T. Produce's violations of the PACA by virtue of the ownership of more than 10 percent of the outstanding stock of B.T. Produce. The Agricultural Marketing Service and the Chief essentially urge that I hold that any individual who owns more than 10 percent of the outstanding stock of a corporation is *per se* responsibly connected with that corporation. However, Congress has rejected the *per se* approach urged by the Agricultural Marketing Service and the Chief.

On November 15, 1995, the definition of the term *responsibly connected* in the PACA was amended to allow an individual who is a holder of more than 10 percent of the outstanding stock of a corporation to rebut his or her status as responsibly connected with the corporation. Specifically, section 12(a) of the Perishable Agricultural Commodities Act Amendments of 1995 amends the definition of the term *responsibly connected* in section 1(b)(9) of the PACA (7 U.S.C. § 499a(b)(9)) by adding a sentence to the definition which reads as follows:

> A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of [the PACA] and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

The applicable House of Representatives Report states the purpose of the 1995 amendment to the definition of *responsibly connected* is "to permit individuals, who are responsibly connected to a company in violation of PACA, the opportunity to demonstrate that they were not responsible for the specific violation."[162] The House of Representatives Report also contains the views of the administration set forth in a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture, House of Representatives, which states that the amendment to the definition of *responsibly connected* would "allow individuals an opportunity to demonstrate that they were only nominal officers, directors, or shareholders and that they were uninvolved in the violation."[163] Louis R. Bonino carried his burden of proof that he was not actively involved in the activities resulting in B.T. Produce's violations of the PACA.

For the foregoing reasons, the following Order should be issued.

ORDER

1. B.T. Produce has committed willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). B.T. Produce's PACA license is revoked, effective 60 days after service of this Order on B.T. Produce.

2. I affirm the Chief's March 31, 2003, determination that Louis R. Bonino was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly,

---

[162] H.R. Rep. No. 104-207, at 11 (1995), 162 *reprinted in* 1995 U.S.C.C.A.N. 453, 458.

[163] H.R. Rep. No. 104-207, at 18-19 (1995), 163 *reprinted in* 1995 U.S.C.C.A.N. 453, 465-66.

Louis R. Bonino is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Louis R. Bonino.

3. I affirm the Chief's March 31, 2003, determination that Nat Taubenfeld was responsibly connected with B.T. Produce when B.T. Produce willfully, flagrantly, and repeatedly violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Accordingly, Nat Taubenfeld is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)), effective 60 days after service of this Order on Nat Taubenfeld.

RIGHT TO JUDICIAL REVIEW

B.T. Produce, Louis R. Bonino, and Nat Taubenfeld have the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. B.T. Produce, Louis R. Bonino, and Nat Taubenfeld must seek judicial review within 60 days after entry of the Order in this Decision and Order.[164] The date of entry of the Order in this Decision and Order is May 4, 2007.

---

[164] See 28 U.S.C. § 2344.

Done at Washington, DC

May 4, 2007

/s/

William G. Jenson
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

[Entered: February 15, 2006]

In re:) PACA Docket No.
) D-02-0023
B.T. Produce Co., Inc.)
)
Respondent)
and
Louis R. Bonino,) PACA Docket No.
) APP-03-0009
Petitioner)
and
Nat Taubenfeld,) PACA Docket No.
) APP-03-0011
Petitioner)

Modification of Decision

On December 7, 2005 I issued a decision in the above-captioned matter, where I imposed a $360,000 civil penalty against B. T. Produce, Inc. in lieu of a 180 day suspension of B.T.'s PACA license. On December 20, 2005, Respondents filed a Motion asking me to reconsider and/or revise the portion of my decision where I imposed a 180 day suspension, pointing out that the statute limited my authority to impose a suspension to a maximum of 90 days. On January 26, 2006 complainant filed a response, agreeing with Respondent that the maximum suspension I could impose was 90 days, but urging me instead to revoke Respondent B.T.'s PACA license.

I am granting Respondent's Motion and limiting the suspension of its license to ninety days. 7 U.S.C. 499h(a) explicitly limits license suspension to "a period not to exceed ninety days." The civil penalty that I imposed in lieu of the suspension remains $360,000. While I agree with Complainant that a 90 day suspension is not a strong enough sanction, I continue to believe that revocation is inappropriate here, for the reasons I discussed in my decision.

Wherefore, I hereby modify Conclusion of Law 4 by changing "180" to "90" and I hereby amend the order I issued on December 7, 2005 to read "Respondent is assessed a civil penalty of $360,000 in lieu of a ninety day suspension of its license."

/s/ Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge

February 15, 2006

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

[Entered: December 5, 2005]

In re:	)	PACA Docket No.
	)	D-02-0023
B.T. Produce Co., Inc.	)	
	)	
Respondent	)	
	and	
Louis R. Bonino,	)	PACA Docket No.
	)	APP-03-0009
Petitioner	)	
	and	
Nat Taubenfeld,	)	PACA Docket No.
	)	APP-03-0011
Petitioner	)	

Decision

In this decision I find that in PACA Docket No. D-02-0023, Respondent B.T. Produce Co., Inc.[1] willfully violated the Perishable Agricultural Commodities Act (Act), and the regulations thereunder. In particular, I find that Respondent violated section 2(4) of the Act, as a consequence of one of its principals paying bribes to a USDA inspector on at least 42 occasions. The violations committed were serious and extended over a significant period of time, and were likely committed to secure a competitive advantage over others. However, after weighing the statutory factors, I am not revoking B.T.'s license, but am instead imposing a civil penalty of $360,000 in lieu of a six month suspension of their license. I also find that both Louis Bonino, in PACA Docket No. APP-03-0009, and Nat Taubenfeld, in PACA Docket No. APP-03-0011, are responsibly connected to B.T.[2]

---

[1] In PACA Docket No. D-02-0023, the USDA's Associate Deputy Administrator, Fruit and Vegetable Service, Agricultural Marketing Service is the Complainant, and B.T. Produce, Inc. is the Respondent. In PACA Docket No. APP-03-0009, Louis R. Bonino is the Petitioner, in PACA Docket No. APP-03-0010, David Taubenfeld was the Petitioner, and in PACA Docket No. APP-03-0011, Nat Taubenfeld is the Petitioner.

Procedural History

On August 15, 2002, Eric Forman, Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, issued a Complaint charging Respondent with "willfully, flagrantly and repeatedly" violating section 2(4) of the Act, and requesting that Respondent's PACA license be revoked. On September 30, 2002, Respondent filed its Answer, denying that it had violated the Act as alleged, and claiming several affirmative defenses. Respondent asked that the claims be dismissed or that an oral hearing be scheduled. On December 2, 2002, former Chief

---

[2] With respect to Petitioner David Taubenfeld, subsequent to the conclusion of the hearing the PACA Chief withdrew his determination that David Taubenfeld was responsibly connected to B.T. during the time period the violations were alleged to have been committed. Accordingly, on January 28, 2005, I granted David Taubenfeld's motion to dismiss his petition for review.

Judge James W. Hunt set the case for a hearing to commence on August 4, 2003.

Meanwhile, on March 31, 2003, James R. Frazier, Chief of the PACA Branch of the Agricultural Marketing Services, made determinations that Louis R. Bonino, David Taubenfeld and Nat Taubenfeld were responsibly connected with Respondent. On April 17, 2003, Petitioners each filed appeals of those determinations. On June 20, 2003, Judge Hunt consolidated the disciplinary case against Respondent and the petitions challenging the responsibly connected determinations for hearing, pursuant to Rule 137(b) of the Rules of Procedure.

The consolidated matter was reassigned to me on July 10, 2003. The hearing was continued to December 1, 2003 due to the illness of David Taubenfeld. I conducted a hearing in New York City from December 8 through 11, 2003, February 17-20, 2004, and August 3 through 4, 2004.[3] Christopher Young-Morales and Ann Parnes of the U. S. Department of Agriculture's Office of General Counsel represented the Agency, and Mark Mandell and Jeffrey Chebot represented Respondent in the disciplinary case and the Petitioners in the responsibly connected matter. The parties subsequently filed initial and reply briefs, and proposed findings of fact and conclusions of law.

---

[3] Although the hearing was scheduled to be completed in December, continuances were necessary due to the recurring illness of David Taubenfeld. Mr. Taubenfeld was finally able to testify on August 3, 2004. Tragically, Mr. Taubenfeld passed away in October, 2005.

Factual Background[4]

What was apparently a long-standing atmosphere of corruption surrounding the Hunts Point Terminal Market in the Bronx became the subject of a fairly extensive federal investigation in 1999. Hunts Point is the largest wholesale produce terminal market in the United States and is the home of many produce houses, including that of Respondent. It handles huge volumes of produce, delivered from points throughout the country and the world. Because produce may have been grown or shipped from many thousands of miles away from New York City, inspections by USDA inspectors play an important role in resolving potential disputes as to the quality of the produce received at Hunts Point.

Produce inspections are normally requested by the receiver of the produce at the market, although the receiver may be acting at the behest of the shipper or another party up or down the line. Approximately 22,000 produce inspections are conducted annually by USDA inspectors at Hunts Point. These inspections are crucial to the successful working of the market at Hunts Point and other produce markets, as the USDA is ostensibly a neutral party who examines the product and verifies its condition, thus allowing for the resolution of potential disputes concerning the condition of the product that arrives at the wholesale market. The inspection certificate allows those parties who no longer have direct access to the produce, such as shippers or growers, to make informed business decisions as to the value of the load, and can result in the renegotiation of terms regarding the sale of the produce.

---

[4] A significant portion of this section is adapted from my decision in Kleiman & Hochberg (appeal pending before the Judicial Officer)

As a general rule, produce needs to be sold as quickly as possible. This is particularly true with produce that is near ripe or ripe, or where there are defects within the shipment, since the passing of time reduces the value of the produce to the extent that much of it may have to be repackaged or even discarded. Normally, even where an inspection is requested, it is often beneficial to the wholesaler and the shipper to begin selling the produce immediately to get the best price for the produce. Essentially, every hour ripe or defective produce sits around the warehouse costs someone money. However, it is in everyone's best interest that the inspection be conducted as soon as possible, so that an accurate accounting of the state of the produce is available to settle possible disputes.

The 1999 investigation, known as Operation Forbidden Fruit, apparently conducted primarily by the Federal Bureau of Investigation (FBI) with the significant involvement of USDA's Office of Inspector General (OIG), uncovered a large network of USDA inspectors who were receiving bribes regarding their conduct of inspections, and produce houses that were paying these bribes. At the same time, it was evident that many produce houses were not paying bribes, and not all inspectors were corrupt.

Complainant's principal witness, William Cashin, is a former USDA inspector at Hunts Point who was caught accepting bribes by investigators, and was arrested by the FBI. Tr. 60.[5] To avoid a prison term, Cashin agreed to cooperate with the investigation, and to wear or carry devices allowing him to record, either through audio or visual means, many of the transactions that involved the alleged offering and taking of bribes. Tr. 61-62, CX 5. During the course of Cashin's participation in Forbidden Fruit, between the time of his agreement with the government to cooperate in March 1999 and his resignation in August 1999, Cashin continued his normal business activities as an inspector. At the conclusion of each business day, he would meet with FBI and OIG agents to discuss the day's events, principally which inspections he received bribes for and for how much. Tr. 61-62. He turned over the money he received as bribes during each of these meetings. Id. These meetings are recorded on the FBI 302 forms, many of which have been received in evidence at the hearing. CX 6-19. It is worth noting that apparently the only activity that Cashin was asked about was the identity of the person offering the bribe, the house that person worked for, the type of produce inspected, and the amount of the bribe. Amazingly, particularly in light of the allegations made by Complainant in this case that in exchange for the bribes Cashin "helped" the briber by misreporting some aspect of what he observed, there is not a shred of evidence on these forms as to what Cashin did in exchange for the bribes.

---

[5] "Tr." Refers to the transcript. Complainant's exhibits are marked CX and are sequentially numbered. Respondent's' exhibits are marked RX and are sequentially lettered (A-Z, AA-SS). The exhibits for the responsibly connected cases are marked RNT 1-11 and RLB 1-9 for Nat Taubenfeld and Louis Bonino, respectively.

Cashin testified that for each of the 42 inspections that he conducted at B.T. between the time of his arrest and his resignation, he was paid $50 in bribes by William Taubenfeld, who at that time was the secretary, a director, and part owner of the company. He stated that in 60% to 75% of these inspections he gave "help" to B.T., in the form of overstating the percentage of defects, overstating the number of containers inspected, or mis-stating the temperatures of the load. Tr. 50-53, 58.

William Taubenfeld, who is the son of Nat Taubenfeld and the brother of David Taubenfeld, was indicted on October 21, 1999 for thirteen counts of Bribery of a Public Official. On May 16, 2001, he pled guilty to a single charge of bribery of a public official in connection with three bribes he paid to Cashin on July 14, 1999. In his plea, he stated that he paid the bribes "with the expectation that on some occasions he would give me favorable treatment by downgrading his rating of produce that he was inspecting." RX QQ at p. 12. William Taubenfeld was sentenced to fifteen months in prison, and 3 years probation, and was ordered to pay a $4,000 fine and $14,585 in restitution. Id., CX 4, Tr. 257-258. William Taubenfeld's connections with B.T. were severed shortly after his arrest, with his ownership rights transferring back to Nat Taubenfeld. He did not appear at the hearing.

B.T. has established itself as a handler of second rate, third rate and distressed produce. Tr. 686-687, 690-691.[6] Much of the produce the company handles has been rejected by other produce houses or stores. B.T. has a reputation for being able to sell lower grades of produce, or produce where the load has significant defects, for good value, so that others send them their lower quality merchandise because they are able to make them more money than they could make otherwise. A number of witnesses testified that they were well-aware that the loads inspected by Cashin contained many problems, since that was why they sent the load to B.T. in the first place, and that they were not surprised when they saw the inspection reports. Further, they were generally pleased with the results achieved by B.T. in the sale of the load.

---

[6] Or as David Taubenfeld stated: "We are not a house of quality. We are a house of seconds and rejections and off-quality product." Tr. 1789.

Nat Taubenfeld,[7] the president of B.T., has been in the fruit and vegetable business since he arrived in this country in 1949. In 1990, he set up the current B.T. business (he had used the same name in a previous business a few decades earlier) with Louis Bonino as his 30% partner. He worked the fruit and vegetable side of the business, while Louis Bonino primarily served as office manager, supervising the employees and managing the money. Tr. 689-690. He brought William Taubenfeld into the business from the time of its establishment, and gradually brought his son David in as well.[8] Tr. 692-693. He gave both William and David shares in the business, although no compensation was involved for these transactions and no share certificates were issued. Tr. 695.

---

[7] His given name is Naftali but he is universally referred to in his business and in this case as Nat.

[8] While David Taubenfeld was listed as a partner in the company, he apparently was not personally aware of that fact, and his role in the company was clearly that of an employee rather than a principal.

Nat Taubenfeld stated that he was unaware that his son was making illegal payments to Cashin. He further stated that he had never given money to any USDA inspector to "attempt to influence the result of that produce inspection." Tr. 698. However, he did indicate that on a number of occasions he gave Cashin money, not to influence inspections but as an act of charity in response to solicitations from Cashin for loans to help Cashin in his relationship with his girlfriend. Tr. 702-704. He was not sure of the time period for these "loans." Cashin had testified that Nat Taubenfeld had been paying him bribes for years, even before he established B.T. Tr.42-44. While the payments Nat Taubenfeld made to Cashin are not the subject of this case, it has some disturbing implications concerning his treatment of inspectors, and his judgment, that have a bearing in fashioning a remedy in this matter.

There was never any evidence introduced indicating that Louis Bonino knew anything about the bribes William Taubenfeld paid to Cashin. It is clear that Mr. Bonino was not involved in the buying and selling of fruit and vegetables, and basically managed the other aspects of the business. Mr. Bonino, who retired on disability as a New York City police officer, and who owned a trucking business before joining Nat Taubenfeld in forming B.T., signed checks and contracts, put in surveillance measures, and managed office staff at B.T. Tr.595-602. He was a 30% owner in the company from the time it was created in 1990, and is its vice-president.

RLB 1. As part of his duties, he also handled the thirty to forty reparations cases that arose as a result of the Forbidden Fruit operation, and which resulted in B.T. paying reparations of $400,000 to $500,000. Tr. 605-607. Mr. Bonino expressed surprise as to why anyone would pay to inflate the defects or otherwise misstate the condition of fruits and vegetables that were already known to have substantial defects and which likely had already been rejected by others before being shipped to B.T., and stated he was not aware of the illegal payments. Tr. 608-609.

Much of the hearing consisted of testimony concerning the 42 inspection certificates, and whether Cashin in fact "helped", B.T. with respect to any of the loads of produce that were the subject of these certificates. Since Cashin steadfastly maintained that he had no specific memory of how he helped B.T. in any particular inspections, and since Complainant called no witnesses who were connected to any of the 42 inspections to testify that they had been in any way impacted by Cashin's actions, there has been little to no reliable proof that any of these certificates were in fact inaccurate. On the other hand, B.T. personnel testified that each of the certificates was accurate, and their testimony was corroborated in a number of instances by testimony from the shippers of the produce that the information in the inspection certificates was consistent with what they expected, given what they knew of the condition of the loads.

Complainant attempted to buttress Cashin's credibility by playing an audiotape of one of his inspections at B.T. on April 23, 1999, where William

Taubenfeld was also present. CX 21. The audiotape was not of the highest quality. The inspection reflected in the discussion was memorialized in the inspection certificate admitted as CX 8. While the tape was difficult to hear, it is clear that William Taubenfeld suggested the percentages of defects in a load of tomatoes, and that Cashin reported the suggested defects in his inspection certificate. Cashin also indicated that the practice of pointing out problems with a load was not unusual. "It's very commonplace for a member of the industry, whether he pays or doesn't pay, to pull defects out of a box and say look at this, look at this, look at that, look what I found." Tr. 973. It was also common for people in the produce business to suggest to the inspector what percentages of defects were in a load. Tr. 974. Cashin's conclusion that he "helped" B.T. with regard to this inspection was based on the fact that Cashin put down the very numbers suggested by William Taubenfeld on the inspection form, and are not based on any recollection that those numbers are incorrect. Id.

While Complainant called no witnesses, other than Cashin, who could have corroborated that any particular inspection certificate was falsified, Respondent's witnesses testified as to their recollection of each transaction. Not only did Nat and David Taubenfeld testify regarding loads they handled that were subject to one of the 42 inspection certificates, but office manager Robin Long, salesman Michael Bonino (who is the son of Petitioner Louis Bonino), Steven Goodman, who was affiliated with the shipper JSG, Peter Silverstein, the president of Northeast Trading, and Harold Levy, a fruit broker at Northeast Trading, all testified as to their roles in many of these transactions.

It is worth discussing several of the transactions in a little more detail. For example, Nat Taubenfeld discussed one of the first inspections included in the indictment and cited in the complaint, which was one of three that took place on March 24, 1999. This inspection involved a load of plums from David Oppenheimer and Company which was received by B.T. two days earlier. On the receiving ticket, Nat Taubenfeld noted in his own handwriting that the plums were "very ripe," RX A, p. 1, Tr. 1095. This indicated to him that "the merchandise had to be moved quick, sold under any price, and not play around with it." Id. The shipment was "pas" or price after sale, indicating that a final price on the merchandise was not to be calculated until the produce was sold or otherwise disposed of. Tr. 1089. The inspection certificate finding of serious damage to 18% of the load, RX A, p. 6, was not inconsistent with his observations that the plums were very ripe. While Oppenheimer suggested that the price be $9 per box of plums, they agreed to an adjustment of $8 per box after factoring in the prices B.T. was able to get for the plums (averaging $8.20), along with the costs associated with repacking or discarding some of the plums. In Nat Taubenfeld's opinion, B.T. suffered a net loss on the transaction. Tr. 1098-1100.

Another transaction worth mentioning is the June 14, 1999 inspection of cherries from Northeast Trading. RX Q. Nat Taubenfeld indicated on the bill of lading, RX Q, p. 3, that the cherries were "soft", as opposed to the firm cherries that customers' desire.

Tr. 1148. He testified that he received an average of $5.26 per box under the market price for these cherries, and that he received a $6 reduction from Northeast Trading as a result. He did not dispute the inspection certificate indicating 21% defects. Peter Silverstein, the president of Northeast Traders, testified with respect to that same shipment, that he had no indication that there was anything wrong with the inspection certificate, Tr. 1648, and that the shipper did not appeal the inspection, Tr. 1639. He thought that it was likely that the older cherries in this shipment were competing against younger and fresher cherries. Tr. 1648-1649.

With respect to pricing in general, Nat Taubenfeld emphasized that shippers and B.T. had a very flexible relationship and that sometimes when a shipper receives a higher price than would be expected from the sale of produce, the understanding is that B.T. would be allowed to recoup a larger profit sometime down the road, to make up for a lesser profit or a loss for a different load. Tr. 1089-1092. He pointed out that "the relationship between the shipper and us plays a tremendous role in our business." Tr. 1092. "[I]t's one hand washes the other. Sometimes you can make a few dollars more, and sometimes the shipper says that's what I can give you and that's what we do." Tr. 1100. David Taubenfeld had a more dramatic explanation—"It's a lot of begging. There's a lot of begging to our customers and pleading and fighting over prices and things like that." Tr. 1797. David Taubenfeld added that they often "work for nothing" on a particular load with the idea of keeping a shipper happy, so the shipper will help them out at a later time. Tr. 1945.

Even though Complainant was unable to demonstrate that any particular inspection certificate was falsified to B.T. 's benefit, the only probative evidence offered in this matter as to the purpose for the illegal payments was favorable treatment in the form of downgrading the quality of inspected produce, on what appears to be an as needed basis. The portrayal by Respondent of its shippers as a contented lot satisfied with the results of inspection certificates is belied by the fact that Operation Forbidden Fruit generated a significant number of reparations actions against B.T., and something in the vicinity of $500,000 in reparations payments by B.T. Tr. 605-607. Certainly, even if loads which were expected by the shipper to be seconds or worse were falsely downgraded even further by the inspector, there would be lower price expectations on behalf of the shipper, and would possibly result in an apparently exceptional job in selling damaged goods that could inure to B.T. 's benefit in terms of future business. Tr. 1302-1305.

David Nielsen, a senior marketing specialist in the PACA Branch's New Brunswick, New Jersey office, testified as to his role in the investigation. His methodology basically consisted of reviewing documents provided the PACA Branch from the FBI and from USDA's Inspector General's Office. Tr. 247. He examined the license files of B.T., and the complaint history of B.T. as well as the documents that were supplied to him. Tr. 252. He went to B.T.'s premises on March 26, 2001 as part of his investigation, particularly seeking out the purchase and sales records related to the inspection certificates that he had been given by the FBI and IG. He spent about two weeks on site in March and

April, and returned for another two weeks several months later. Tr. 279. Substantial requested records were turned over to him. While Mr. Nielsen testified that he produced a report of investigation that B.T. violated section 2(4) of the PACA by paying bribes to a federal inspector to falsify 42 inspection certificates, he based that conclusion on what he had received from the FBI and the IG, and admitted under cross-examination that there were no records of B.T. indicating any evidence of falsification of inspection reports, nor were there any records supporting a finding that B.T. paid bribes. Tr. 284-287. Likewise, although he stated in his report that the 42 inspection certificates were used to obtain price adjustments, his report was not accurate. Tr. 290-291. He later admitted that in other areas the conclusions in his investigative report were not always accurate, Tr. 308 (no adjustment on the load from Trinity Fruit, RX I, even though his inspection report said that a falsified inspection was used to get an adjustment); Tr. 310 (no adjustment on the load of Garden Fresh Mangos or Mission produce mangos even though his inspection report said that a falsified inspection was used to get an adjustment); and that his statement in his investigation report about falsification was "an assumption . . . my understanding of the information that I had been given." Tr. 321.

John Koller, a senior marketing specialist with the PACA Branch, testified as Complainant's sanctions witness. Mr. Koller testified that the payment of bribes by B.T. "to a produce inspector constitutes willful, repeated and flagrant violations of the PACA." Tr. 489. Mr. Koller further testified that bribing an inspector "corrupts the inspection process," Tr. 490, and violates the fair trade practices provisions of PACA. He testified that the payment of bribes by William Taubenfeld constituted bribery by B.T. since William Taubenfeld was an officer and employee of B.T., and since his actions were within the scope of his employment. Tr. 490-491. He pointed out that when pleading guilty in court, William Taubenfeld admitted that the bribes were made with an expectation of favorable treatment on some occasions. Tr. 496, RX QQ.

Mr. Koller recommended that an appropriate sanction would be revocation of B.T.'s license. Tr. 499. He stated that civil penalties were not appropriate here, because "bribery payments being made to a produce inspector to obtain false information on the inspection . . . undermines the credibility of the inspection certificate itself, and. . . the inspection process and its credibility." Tr. 502. He also stated that revocation was warranted because of the length of time the bribery had continued and because "USDA has consistently recommended license revocation in the case of bribery . . ." Tr. 503. Even in instances where a bribe was paid and the particular inspection certificate was accurate, there is a benefit to the bribe payer, according to Mr. Koller, because the bribe payer could benefit at a later time, Tr. 516, and because bribery creates an "unlevel playing field." Tr. 591. Indeed, in his guilty plea, William Taubenfeld stated the purpose of his illegal payments was for future benefits. However, Mr. Koller also admitted that the Department was not "able to identify a single one of the 42 inspections here that was falsified . . ." Tr. 533.

Statutory and Regulatory Background

The Perishable Agricultural Commodities Act governs the conduct of transactions in interstate commerce involving perishable produce. Among other things, it defines and seeks to sanction unfair conduct in the conduct of transactions involving perishables. Section 499b provides:

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain

> the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

The penalties for violating the Act may be severe. Thus, upon a finding that a licensed dealer or broker "has violated any of the provisions of section 499b," the Secretary may, "if the violation is flagrant and repeated . . . revoke the license of the offender." 7 U.S.C. §499h(a). The Act also provides for civil penalties as an alternative to license suspension or revocation. "In lieu of suspending or revoking a license . . . the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues . . . giv[ing] due consideration to the size of the business, the number of employees, and the seriousness, nature and amount of the violation." 7 U.S.C. §499h(e).

The Act does not require that Respondent be aware of the specific violations committed by one of its principals or employees in order for the company to be found liable for the violations. Section 16 of the Act, 7 U.S.C. §499p, provides: . . . the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person."

In addition to penalizing the violating dealer or broker, the Act also imposes severe sanctions against any person "responsibly connected" to an establishment that has had its license revoked or suspended. 7 U.S.C. §499h(b). The Act prohibits any licensee under the Act from employing any person who was responsibly connected with any person whose license "has been revoked or is currently suspended" for as long as two years, and then only upon approval of the Secretary. Id.

> (9) The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

Findings of Fact

1. B.T. Produce Co., Inc. (Respondent) is a New York Corporation whose business and mailing address is 163-133 Row A, Hunts Point Terminal

Market, Bronx, New York 10474. At all times pertinent to this matter, Respondent was a licensee under the Perishable Agricultural Commodities Act (PACA, or the Act). CX 1.

2. William J. Cashin was employed as a produce inspector at the Hunts Point Terminal Market, New York, office of the United States Department of Agriculture's Agricultural Marketing Service's Fresh Products Branch, from July 1979 through August 1999. Tr. 36.

3. Cashin was one of numerous USDA produce inspector's who participated in a scheme whereby they received bribes for the conduct of produce inspections. On March 23, 1999, Cashin was arrested by agents of the FBI and USDA's OIG. Tr. 60. After his arrest, Cashin entered into a cooperation agreement with the FBI, agreeing to assist the FBI with their investigation into corruption at Hunts Point Market. Tr. 60-62, CX 5.

4. With the approval of the FBI and the OIG, Cashin continued to perform his duties as a produce inspector in the same fashion as before his arrest. Cashin surreptitiously recorded interactions with individuals at different produce houses using audio and/or video recording devices. At the end of each day, Cashin would give the FBI agents his tapes, turn in any bribes he received, and recount his activities. The FBI agents would prepare a "302" report summarizing what Cashin told them about that day's activities. Tr. 61-62; CX 6-19.

5. Beginning in 1994, and more specifically from the period between March 24, 1999 through

August, 1999, William Taubenfeld paid bribes to William Cashin. In particular, he paid Cashin $50 bribes for each of the 42 inspections cited in the Complaint.

6. The bribes were paid with the expectation that Cashin would occasionally downgrade the quality of the merchandise he was inspecting, presumably to give B.T. a competitive advantage. RX QQ.

7. There was no specific evidence that any of the 42 inspections cited in the Complaint were falsified.

8. The evidence supports a finding that there were transactions where B.T.'s position was improved by the falsification of inspections as a result of bribes paid to Cashin.

9. During the period in which he paid bribes to Cashin, William Tauhenfeld was secretary, a director and a significant shareholder in Respondent. CX 1.

10. During the period described in paragraph 9, Nat Taubenfeld was president, a director, and a significant shareholder in B.T. CX 1. Nat Taubenfeld was intimately involved in the day-to-day operations of B.T., particularly in the area of buying and selling of fruit.

11. During the period described in paragraph 9, Louis Bonino was the vice president, a director and a thirty percent shareholder of B.T. CX 1. Louis Bonino was .involved in the day-to-day

operations of B.T., principally managing the office aspect of operations.

12. There is no evidence that Nat Taubenfeld or Louis Bonino knew that William Taubenfeld was making illegal payments to William Cashen.

Conclusions of Law

1. Payment of bribes to a USDA produce inspector constitutes a failure to perform a duty express or implied in connection with transactions of perishable agricultural commodities in violation of section 2(4) of PACA.

2. The acts of bribery committed by William Taubenfeld constitute violations of section 2(4) of PACA by Respondent.

3. Respondent has committed 42 willful, flagrant and repeated violations of PACA 2(4) by paying bribes to a USDA produce inspector.

4. The appropriate sanction in this case is license suspension for a period of 180 days. Rather than suspend Respondent's license, I impose an alternative civil penalty of $360,000.

5. Nat Taubenfeld is responsibly connected to Respondent.

6. Louis Bonino is responsibly connected to Respondent.

Discussion

I find that one of Respondent's principal owners and officers, William Taubenfeld, paid bribes to William Cashin in each of the 42 instances alleged by Complainant. I further find that bribery of a USDA produce inspector violates the Perishable Agricultural Commodities Act, and that these violations were willful, flagrant and repeated. I find that Respondent is liable for these violations. I further find that while there is no specific evidence that any of these 42 inspection certificates were falsified, that the evidence shows that the illegal payments were made with the expectation that B.T. would receive some help from Cashin in the form of falsified inspection reports, and that while Complainant provided no proof of any specific falsification, the fact that significant reparations were paid by B.T. as a direct result of Operation Forbidden Fruit cannot be ignored. I find that the purposes of the PACA can best be achieved in this matter by the assessment of a significant civil penalty, rather than .license revocation. Therefore, I am imposing a civil penalty of $360,000 against Respondent in lieu of a 180-day suspension of its license. Since I am not suspending or revoking Respondent's license (unless Respondent elects to serve the suspension rather than pay the penalty), there is no ban on the employment of Nat Taubenfield or Louis Bonino by any licensee; however, I am making a finding, in the event that my sanction remedy is subsequently reversed, that Nat Taubenfeld and Louis Bonino are each responsibly connected to Respondent.

I. Respondent's bribery of a USDA produce inspector on at least 42 occasions constituted willful, flagrant and repeated violations of the Perishable Agricultural Commodities Act.

A. William Taubenfeld, the secretary, director and a major shareholder in Respondent, paid bribes to USDA produce inspector William Cashin on at least 42 occasions.

There is no evidence which would contradict a finding that William Taubenfeld made $50 payments to William Cashin in the 42 instances recited in the complaint. While William Taubenfeld's plea was only for a single count of bribery based on three inspections for which he was bribed on July 14, 1999, Cashin's undisputed testimony as corroborated in the FBI's 302 forms, along with William Taubenfeld's guilty plea, leave little doubt that the practice of bribing Cashin was part of a long-standing practice.

It is likewise undisputed that William Taubenfeld was secretary of Respondent at the time the violations alleged in the Complaint were committed, and that he was a significant shareholder of Respondent.[9]

---

[9] B.T.'s filings with the PACA Branch indicate that an entity known as "Taubenfeld Brothers Produce, Inc." was 70% owner of B.T. at the time of the violations, but apparently no stock certificates were ever issued to memorialize this, nor was Nat Taubenfeld even aware that this entity existed. It is clear, though, that Nat Taubenfeld and his son William, along with Louis Bonino, were the principal owners of the company.

B. Respondent is liable for the violative acts of William Taubenfeld that were committed within the scope of his employment or office.

Section 16 (U.S.C. §499p) of the Act that states that "in every case" "the act, omission, or failure of any agent, officer or other person acting for or employed by any commission merchant, dealer, or other person acting for or employed by any commission merchant, dealer or broker, within the scope of his employment or office," "shall be deemed the act, omission, or failure" of the employer. There is no disputing that William Taubenfeld paid bribes to William Cashin for the 42 inspections. While there was no evidence indicating that the money used to bribe Cashin came from company funds, nor was there any specific evidence that either Nat Taubenfeld or Louis Bonino was aware of the bribery, the purpose behind the bribes, as undisputedly testified to by Cashin and confirmed by the plea of William Taubenfeld, was to benefit Respondent, with the hope that produce inspected by Cashin would be downgraded to the benefit of B.T.

Thus, in Post & Tauback, Inc., 62 Agric. Dec. 802 (2003), the Judicial Officer held that Section 16 "provides an identity of action between a PACA licensee and the PACA licensee's agents and employees." Id., at 820. As long as William Taubenfeld was acting within the scope of his employment, which he clearly was, violations committed by him are deemed to be violations by Respondent.

Even if other principals in the company, as well as its employees, were unaware of William Taubenfeld's actions, the absence of actual knowledge is insufficient to rebut the burden imposed by section 499p. In Post & Taback. Inc., the Judicial Officer unequivocally held that "as a matter of law, . . . violations by [an employee] . . . are . . . violations by Respondent, even if Respondent's officers, directors, and owners had no actual knowledge of the . . . bribery . . . and would not have condoned [it]." Id., at 821. If a company can be held responsible for the acts of an employee, who was not an officer or an owner, even where the company's officers had no knowledge of the acts committed by that employee, then *a fortiori* the company would be responsible for the acts of a person who is both an owner and an officer, whether or not the other officers had actual knowledge of the violative conduct. The clear and specific language of the Act would be defeated by any other interpretation.

C. Bribery of a USDA produce inspector violates PACA.

Section 2(4) of the PACA makes it unlawful "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any . . . transaction." Agency case law has consistently interpreted this provision to hold that the payment of bribes to a USDA produce inspector is a violation of PACA. Thus, the Judicial Officer held in Post & Taback:

> A produce buyer's payment of bribes and unlawful gratuities to a United

> States Department of Agriculture inspector in connection with produce inspections eliminates, or has the appearance of eliminating, the objectivity and impartiality of the inspector and undermines the trust that produce buyers and sellers have in the integrity of the inspector and the accuracy of the inspector's determinations of the condition and quality of the inspected produce. Moreover, unlawful gratuities and bribes paid to United States Department of Agriculture inspectors threaten the integrity of the entire inspection system and undermine the produce industry's trust in the entire inspection system.

Id., at 825. Bribery, whatever the motive, in and of itself offends the notion of fair competition. The Agency, through the Judicial Officer, and the Courts, has recognized that there is a general commercial duty to deal fairly which is required of all PACA licensees. In Sid Goodman and Co., Inc., 49 Agric. Dec. 1169, 1183-4 (1990), aff'd, 945 F. 2d 398 (4th Cir. 1991), cert. denied, 503 U.S. 970 (1992), the Judicial Officer cites a line of cases to the effect that "members of the produce industry have an obligation to deal fairly with one another" and goes on to hold that commercial bribery is "unfair" in the context of PACA. Similar holdings, although under distinguishable circumstances, confirm this view of commercial bribery. See e.g., JSG Trading Corp., 58 Agric. Dec. 1041 (1999), aff'd 235 F. 3rd 608 (D.C. Cir. 2001), cert. denied, 122 S. Ct. 458 (2001). I followed this same line of reasoning in Kleiman & Hochberg (appeal pending before the Judicial Officer).

D. The bribery violations committed by Respondent were willful, flagrant and repeated.

Complainant easily meets its burden of showing that the bribes paid by William Taubenfeld constituted willful, flagrant and repeated violations of the PACA.

A violation is "willful" if "irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by statute or carelessly disregards the requirements of a statute." PMD Produce Brokerage Corp., 60 Agric. Dec. 780, 789 (2001). Here, William Taubenfeld, and therefore Respondent, knew that the payments made to Cashin in the 42 inspections involved in this case were illegal, but essentially decided that they needed to make these payments for the benefit of their business. Clearly, Respondent made a business decision to violate the law, rather than to pursue alternative measures. This constitutes willful conduct.

Likewise, the violations were "flagrant." In Post & Taback, supra, the Judicial Officer found, citing the dictionary definition of "flagrant" as covering conduct "conspicuously bad or objectionable" or so bad that it "can neither escape notice nor be condoned," that "payments of unlawful gratuities and bribes to a United States Department of Agriculture inspector in connection with the inspection of perishable agricultural commodities are conspicuously bad and objectionable acts that cannot escape notice or be condoned because . . . they corrupt the United States Department of Agriculture's produce inspection system and disrupt the produce industry." Id., at 829-30. Here, where the purpose of the bribes undisputedly would be to gain an occasional competitive advantage over a grower or a seller, the long-standing practice of Respondent bribing Cashin easily meets the definition of flagrant under applicable case law.

Finally, the violations are obviously repeated. Complainant demonstrated that 42 instances of bribery occurred between March and August, 1999, and that there was every indication that this practice had begun long before Operation Forbidden Fruit. Since repeated means more than once, this element has been established by Complainant.

Thus, I hold that Respondent has committed willful, flagrant and repeated violations of section 2(4) of the PACA.

II. The Appropriate Sanction Against Respondent is a Civil Penalty of $360,000

Complainant has requested the imposition of license revocation as an appropriate sanction for these violations, contending that, in essence, for any bribery conviction under PACA revocation, rather than imposition of a civil penalty or other remedy, is the only appropriate sanction. Respondent, on the other hand, urges that, if I find that violations have been committed, then I should assess a penalty of $2,000 for each of the instances of bribery, for a total civil penalty of $84,000. After weighing the statutory and regulatory factors, I conclude that a $360,000 civil penalty in lieu of a six-month license suspension is appropriate.

While Complainant failed to show any particular instance in which an inspection certificate was falsified by Cashin as a result of the bribes he was being paid by William Taubenfeld, it is abundantly clear that the bribes served as a type of retainer for future favors on an as-needed basis, to the benefit of B.T., and to the detriment of shippers, sellers or growers. This is a significant degree more serious, in my estimation, than a situation, such as was present in Kleiman & Hochberg, where there was no reliable evidence that any certificates were ever falsified, and the consistent and reliable testimony supported a finding that bribes were only paid to get the inspectors to conduct the inspection in a timely manner. Here, the bribing official admitted in his plea that the purpose of the bribes was to get Cashin to downgrade produce on occasion.

In addition, the attitude of Respondent's president, Nat Taubenfeld, towards the making of payments to a USDA inspector does not reflect a corporate attitude consistent with the PACA. Although illegal payments made by Nat Taubenfeld were not a subject of the complaint, Cashin testified that before William Taubenfeld paid him bribes, Nat Taubenfeld paid him as well, both at RT. and in his prior workplace. Tr. 48-50. Nat Taubenfeld testified that he did indeed give Cashin several hundred dollars over time but that he did it out of charity, after Cashin told him he had "problems" with a girlfriend, that it "was always pretty much the same story," and that these "loans" were not given with the expectation of receiving anything in return. Tr. 711-713. Even if Nat Taubenfeld was motivated by charitable intentions, it is either extremely naive or extremely cynical for the president of a produce company to pay such gratuities to the very person who inspects his produce.[10]

Even though the violations in this case are more severe than those in Kleiman & Hochberg, I find that the goals of the PACA can be readily met by the imposition of a $360,000 civil penalty in lieu of a six month suspension than by revocation of B.T.'s license. Complainant contends, in essence, that whenever an individual in a produce company pays a bribe to a produce inspector revocation is mandated, and implies that that is the Judicial Officer's sanction policy as well. Compo Br. At 35. While there is no question that bribery is one of the most serious, if not the most serious, violations of the PACA, the fact is that there is a permissible range of sanctions under the statute. By the specific terms of 7 U.S.C. §499h(e), even where a violation is serious enough to warrant a license revocation, the Secretary is given the authority to instead impose a civil penalty "not to exceed $2,000 for each violative transaction or each day the violation continues." While the Secretary must consider "the size of the business, the number of employees, and the seriousness, nature, and amount of the violation," Id., it is abundantly clear that Congress gave the Secretary discretion to assess a civil penalty even where the circumstances could justify a license revocation.

---

[10] I do not include the $20 farewell gift for Cashin's "retirement" in this categorization.

Certainly, the Secretary is free, on his own accord or through the Judicial Officer, of establishing a policy that whenever bribes are paid to a produce inspector for the purpose of influencing, either at the time of paying the bribe or at some undefined future occasion, the outcome of a produce inspection, the sanction is revocation, without any option for alternative civil penalties. At this point, neither the Secretary nor the Judicial Officer has established such a policy.

Complainant, primarily through the testimony of its sanctions witness, John Koller, vigorously advocates that revocation is the only appropriate sanction, due to "the detrimental effect that bribery of inspectors has on the produce industry." Compo Br. At 37, Tr. 498. However, neither Mr. Koller at the hearing, nor Complainant in its briefs, provides any specific reason why a significant civil penalty will not accomplish the deterrence that is the aim of the statute. While I am required to give "appropriate weight to the recommendation of the administrative officials charged with the responsibility for achieving the congressional purpose," S.S. Farms Linn County. Inc., 50 Agric. Dec. 476, 497 (1991), aff'd 991 F. 2d 803, I am not required to blindly follow these recommendations, particularly when no showing has been made why a civil penalty cannot serve as a "strong sanction" that would deter the bribery of produce inspectors.

In imposing a civil penalty, rather than license revocation, I did give consideration to the impact on Respondent's employees. The fact that 35-40 employees who were not involved in the acts of bribery, and who had no basis to believe that any criminal acts were being committed, would lose their jobs, and the fact that the significant majority of these employees are minorities, Tr. 599, 661, 664, supports the imposition of a civil penalty, which has more of an impact on company ownership than its non-culpable employees.

On the other hand, Respondent's suggestion that an appropriate penalty would be $84,000, Resp. Br. at 92, based on a $2,000 civil penalty for each of the 42 inspections cited in the complaint, would result in an, inadequate sanction in terms of the types of violations committed, and the duration of the violations. These were very serious violations, which strike at the heart of the produce inspection process. Here, the purpose of the bribes was to give Respondent an economic advantage over other parties to produce transactions. The Judicial Officer has repeatedly imposed serious sanctions when this criterion is met. Thus, in Sid Goodman and Co., Inc., supra, the Judicial Officer sustained an administrative law judge's determination that license revocation was appropriate in large part because payments were made to employees of another company to induce them to purchase from Goodman, to the economic advantage of Goodman and the disadvantage of the company of the employees who received the illegal payments. Similarly, in Tipco, Inc., 50 Agric. Dec. 871 (1991), the decision emphasized that "members of the produce industry have an obligation to deal fairly with one another," Id., at 882, and that utilizing bribery to gain an advantage over competitors was a significant factor in the Judicial Officer's decision to revoke a PACA license.

While there are clearly some factors here that would justify imposition of the ultimate sanction of license revocation, I believe that the imposition of a significant civil penalty would be more consistent with the Act's ultimate aims. In imposing a sanction, the Secretary of Agriculture takes "aggravating and mitigating circumstances into account . . . The United States Department of Agriculture's sanction policy has long provided that the sanction is determined by examining all relevant circumstances." George A. Heimos Produce Company, Inc., 62 Agric. Dec. 763, 797 (2003). As I already discussed, I find that factoring in the serious nature of the violation, the size and nature of the business, including the welfare of its employees, and the likely deterrent effect, the $360,000 civil penalty is consistent with the PACA.

III. Respondent's Constitutional Claims are Without Basis

Respondent contends that holding it liable for the actions of William Taubenfeld violates its constitutional rights to due process and equal protection. To the extent that I have the authority to rule on constitutional challenges, I find these claims to be without justification.

Respondent bases its constitutional claims on the Agency's applying Section 16 of the PACA to hold Respondent liable for the actions of William Taubenfeld, who it classifies as a "rogue" employee. While Respondent is of course entitled to due process, it is clear to me that the literal terms of the statute are intended to apply to just this type of situation—that when a corporate officer and shareholder commits illegal acts on behalf of the corporation then the corporation is liable. See discussion, supra, at 20-21. Section 16 of the PACA is explicit in providing for corporate liability for just this type of situation, and the PACA has been consistently interpreted accordingly. Further, this portion of the act is also consistent with the doctrine of *respondeat superior*. Holding a corporation responsible for the actions of its employees, particularly where the employee is an officer, director and stockholder, and where the admitted purpose of the actions is to benefit the corporation at a later date, hardly puts a strain on the corporation's constitutional rights.

Respondent's irrebuttable presumption contention also fails. While an irrebuttable presumption would raise constitutional questions, *Landrum v. Block*, 40 Agric. Dec. 922, 925 (1981), the notion that Respondent is responsible for the actions of its employees, let alone someone who is an officer, director and shareholder acting for what he perceives to be the future benefit of the Respondent, and to the possible economic detriment of others engaging in transactions with Respondent, is not offensive to due process.

IV. Both Nat Taubenfeld and Louis Bonino are Responsibly Connected to Respondent

Although I am only imposing a civil penalty against Respondent, I am making findings on the two responsibly connected petitions in the event that my sanction imposition is reversed or modified, or if Respondent elects to accept the 180-day license suspension in lieu of the payment of the $360,000 civil penalty.

A. Nat Taubenfeld

Nat Taubenfeld is the co-founder of Respondent, and has been president, a director and the individual in charge of the produce end of B.T. since its inception. RNT 1, Tr. 678, 684, 698, 700, 716-717. He has participated in the day-to-day management of Respondent from the day he co-founded it, principally running the night shift, buying and selling produce, etc. He communicated to B.T. personnel how he expected them to conduct B.T.'s business, and had a significant role in the hiring and firing of personnel. Tr. 705-707, 721. His role included requesting inspections from USDA inspectors, and seeking and obtaining price adjustments based on the results of inspections. Tr. 1281, 1298. He brought both of his sons into the business. Tr.701-703.

Although Nat Taubenfeld is not charged with being directly involved in the violative acts, his actions regarding "charitable" payments to Cashin are not consistent with an individual who instructs his employees on the proper way to do business. Tr. 705-707. There is no dispute that he made numerous payments to Cashin that were not related to the fee that USDA collects for the conduct of inspections. However, since there are no allegations that he made any such payments during the period that is the subject of the complaint, I rule that he has met his burden of showing; under the statute, that he "was not actively involved in the activities resulting in a violation of this Act."

However, the statute requires not only a showing of non-involvement in the violative activities, but requires an additional showing that the person "was only nominally a partner, officer, director or shareholder." Nat Taubenfeld fails to meet his burden under this test, as it is clear that he was intimately involved in the day-to-day workings of B.T., that he was considered by company personnel to be the head of the company, and that he was involved in many or most of the decisions involving the produce end of the company. Tr. 669, 684, 1281, 1298. He had the authority to hire and fire, he signed checks (Tr. 705, RNT 6), he made decisions as to what to buy, when to call for inspections, and far more. He does not come close to meeting the test for showing that he was not actively involved in B.T. or that his position was purely nominal.

B. Louis Bonino

There is no evidence that Louis Bonino participated in or was aware of any of the violative activities that are the subject of the complaint. However, Mr. Bonino is unable to meet the burden of the second prong of the responsibly connected definition, as he was a 30% stockholder, vice-president and director of the corporation since he co-founded it with Nat Taubenfeld in 1990. RLB I.

In particular, Mr. Bonino was directly involved in the day-to-day affairs of Respondent, running the office side of the business. Tr. 595, 605, 652-653. His responsibilities included signing checks, handling cash, signing contracts, hiring, firing and training employees, and overseeing security. He personally was present at Respondent's business address three to four days a week. Tr. 633. He directly handled, on behalf of Respondent, reparation complaints that were filed against it. Tr. 611. While it can be argued that by virtue of his responsibilities he should have discovered the illegal acts of William Taubenfeld and taken action to prevent them, and accordingly should be found to have been "actively involved" in the violative acts, he successfully met his burden of showing that there was no reasonable way he could have known of the illegal payments.

As with Nat Taubenfeld, however, Mr. Bonino is unable to show that he was only "nominally" involved in Respondent's operations. His ownership role, his substantial responsibilities in many aspects of the business, and his authority over employees are inconsistent with a nominal role in B.T.

CONCLUSION AND ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent is assessed a civil penalty of $360,000 in lieu of a 180-day suspension of its license.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1. 145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 6th day of December, 2005

/s/ Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1240 **September Term 2008**
AGRI-PACA-D-02-0023
Filed On: December 5, 2008

B. T. Produce Co., Inc.,

Petitioner

v.

Department of Agriculture and
United States of America,

Respondents

Consolidated with 07-1241, 07-1242

BEFORE: Sentelle, Chief Judge, and Henderson and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioners' petition for panel rehearing filed on October 30, 2008, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-1240 **September Term 2008**
AGRI-PACA-D-02-0023
Filed On: December 5, 2008

B. T. Produce Co., Inc.,

Petitioner

v.

Department of Agriculture and
United States of America,

Respondents

Consolidated with 07-1241, 07-1242

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C.A. § 551

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

→§ 551. Definitions

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

* * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;

* * * *

5 U.S.C.A. § 551

5 U.S.C.A. § 558

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART 1. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

→§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

5 U.S.C.A. § 706

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART 1. THE AGENCIES GENERALLY
CHAPTER 7. JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930
(7 U.S.C. §§ 499a – 499t)

* * * *

[preamble]

AN ACT to suppress unfair and fraudulent practices in the marketing of perishable agricultural commodities in interstate and foreign commerce.

* * * *

published at AMS at USDA, Perishable Agricultural Commodities Act (PACA) website, http://www.ams.usda.gov/fvpaca/7usc499a.htm 4/2/2008

7 U.S.C.A. § 499a

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL COMMODITIES

→§ 499a. Short title and definitions

(a) Short title

This chapter may be cited as the "Perishable Agricultural Commodities Act, 1930".

(b) Definitions

For purposes of this chapter:

* * * *

> **(9)** The term "responsibly connected" means affiliated or connected with a commission merchant, dealer, or broker as (A) partner in a partnership, or (B) officer, director, or holder of more than 10 per centum of the outstanding stock of a corporation or association. A person shall not be deemed to be responsibly connected if the person demonstrates by a preponderance of the evidence that the person was not actively involved in the activities resulting in a violation of this chapter and that the person either was only nominally a partner, officer, director, or shareholder of a violating licensee or entity subject to license or was not an owner of a violating licensee or entity subject to license which was the alter ego of its owners.

* * * *

7 U.S.C.A. § 499b

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL COMMODITIES

→§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(1) For any commission merchant, dealer, or broker to engage in or use any unfair, unreasonable, discriminatory, or deceptive practice in connection with the weighing, counting, or in any way determining the quantity of any perishable agricultural commodity received, bought, sold, shipped, or handled in interstate or foreign commerce.

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer.

(3) For any commission merchant to discard, dump, or destroy without reasonable cause, any perishable agricultural commodity received by such commission merchant in interstate or foreign commerce.

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter.

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, stencil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State, country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce. However, any commission merchant, dealer, or broker who has violated--

(A) any provision of this paragraph may, with the consent of the Secretary, admit the violation or violations; or

(B) any provision of this paragraph relating to a misrepresentation by mark, stencil, or label shall be permitted by the Secretary to admit the violation or violations if such violation or violations are not repeated or flagrant;

and pay, in the case of a violation under either clause (A) or (B) of this paragraph, a monetary penalty not to exceed $2,000 in lieu of a formal proceeding for the suspension or revocation of license, any payment so made to be deposited into the Treasury of the United States as miscellaneous receipts. A person other than the first licensee handling misbranded perishable agricultural commodities shall not be held liable for a violation of this paragraph by reason of the conduct of another if the person did not have knowledge of the violation or lacked the ability to correct the violation.

(6) For any commission merchant, dealer, or broker, for a fraudulent purpose, to remove, alter, or tamper with any card, stencil, stamp, tag, or other notice placed upon any container or railroad car containing any perishable agricultural commodity, if such card, stencil, stamp, tag, or other notice contains a certificate or statement under authority of any Federal or State inspector or in compliance with any Federal or State law or regulation as to the grade or quality of the commodity contained in such container or railroad car or the State or country in which such commodity was produced.

(7) For any commission merchant, dealer or broker, without the consent of an inspector, to make, cause, or permit to be made any change by way of substitution or otherwise in the contents of a load or lot of any perishable agricultural commodity after it has been officially inspected for grading and certification, but this shall not prohibit re-sorting and discarding inferior produce.

7 U.S.C.A. § 499d

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL COMMODITIES

→§ 499d. Issuance of license

(a) Authority to do business; termination; renewal

Whenever an applicant has paid the prescribed fee the Secretary, except as provided elsewhere in this chapter, shall issue to such applicant a license, which shall entitle the licensee to do business as a commission merchant and/or dealer and/or broker unless and until it is suspended or revoked by the Secretary in accordance with the provisions of this chapter, or is automatically suspended under section 499g(d) of this title, but said license shall automatically terminate on the anniversary date of the license at the end of the annual or multiyear period covered by the license fee unless the licensee submits the required renewal application and pays the applicable renewal fee (if such fee is required): *Provided,* That notice of the necessity of renewing the license and of paying the renewal fee (if such fee is required) shall be mailed at least thirty days before the anniversary date: *Provided, further,* That if the renewal fee (if required) is not paid by the anniversary date the licensee may obtain a renewal of that license at any time within thirty days by paying the fee provided in section 499c(b) of this title, plus $50, which shall be deposited in the Perishable Agricultural Commodities Act fund provided for by section 499c(b) of this title: *And* *provided further*, That the license of any licensee shall terminate upon said licensee, or in case the licensee is a partnership, any partner, being discharged as a bankrupt, unless the Secretary finds upon examination of the circumstances of such bankruptcy, which he shall examine if requested to do so by said licensee, that such circumstances do not warrant such termination.

(b) Refusal of license; grounds

The Secretary shall refuse to issue a license to an applicant if he finds that the applicant, or any person responsibly connected with the applicant, is prohibited from employment with a licensee under section 499h(b) of this title or is a person who, or is or was responsibly connected with a person who--

(A) has had his license revoked under the provisions of section 499h of this title within two years prior to the date of the application or whose license is currently under suspension;

(B) within two years prior to the date of application has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect;

(C) within two years prior to the date of the application, has been found guilty in a Federal court of having violated the provisions of sections 491, 493 to 497 of this title, relating to the prevention of destruction and dumping of farm produce; or

(D) has failed, except in the case of bankruptcy and subject to his right of appeal under section 499g(c) of this title, to pay any reparation order issued against him within two years prior to the date of the application.

(c) Issuance of license upon furnishing bond; issuance after three years without bond; effect of termination of bond; increase or decrease in amount; payment of increase

An applicant ineligible for a license by reason of the provisions of subsection (b) of this section may, upon the expiration of the two-year period applicable to him, be issued a license by the Secretary if such applicant furnishes a surety bond in the form and amount satisfactory to the Secretary as assurance that his business will be conducted in accordance with this chapter and that he will pay all reparation orders which may be issued against him in connection with transactions occurring within four years following the issuance of the license, subject to his right of appeal under section 499g(c) of this title. In the event such applicant does not furnish such a surety bond, the Secretary shall not issue a license to him until three years have elapsed after the date of the applicable order of the Secretary or decision of the court on appeal. If the surety bond so furnished is terminated for any reason without the approval of the Secretary the license shall be automatically canceled as of the date of such termination and no new license shall be issued to such person during the four-year period without a new surety bond covering the remainder of such period. The Secretary, based on changes in the nature and volume of business conducted by a bonded licensee, may require an increase or authorize a reduction in the amount of the bond. A bonded licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and upon failure of the licensee to provide such bond his license shall be automatically suspended until such bond is provided. The Secretary may not issue a license to an applicant under this subsection if the applicant or any person responsibly connected with the applicant is prohibited from employment with a licensee under section 499h(b) of this title.

(d) Withholding license pending investigation

The Secretary may withhold the issuance of a license to an applicant, for a period not to exceed thirty days pending an investigation, for the purpose of determining (a) whether the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or (b) whether the application contains any materially false or misleading statement or involves any misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee of the applicant. If after investigation the Secretary believes that the applicant should be refused a license, the applicant shall be given an opportunity for hearing within sixty days from the date of the application to show cause why the license should not be refused. If after the hearing the Secretary finds that the applicant is unfit to engage in the business of a commission merchant, dealer, or broker because the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, prior to the date of the filing of the application engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or because the application contains a materially false or misleading statement made by the applicant or by its representative on its behalf, or involves a misrepresentation, concealment, or withholding of facts respecting any violation of the chapter by any officer, agent, or employee, the Secretary may refuse to issue a license to the applicant.

(e) Refusal of license

The Secretary may refuse to issue a license to an applicant if he finds that the applicant, or in case the applicant is a partnership, any general partner, or in case the applicant is a corporation, any officer or holder of more than 10 per centum of the stock, has, within three years prior to the date of the application, been adjudicated or discharged as a bankrupt, or was a general partner of a partnership or officer or holder of more than 10 per centum of the stock of a corporation adjudicated or discharged as a bankrupt, and if he finds that the circumstances of such bankruptcy warrant such a refusal, unless the applicant furnishes a bond of such nature and amount as may be determined by the Secretary or other assurance satisfactory to the Secretary that the business of the applicant will be conducted in accordance with this chapter.

7 U.S.C.A. § 499h

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL
COMMODITIES

→§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

(b) Unlawful employment of certain persons; restrictions; bond assuring compliance; approval of employment without bond; change in amount of bond; payment of increased amount; penalties

Except with the approval of the Secretary, no licensee shall employ any person, or any person who is or has been responsibly connected with any person--

(1) whose license has been revoked or is currently suspended by order of the Secretary;

(2) who has been found after notice and opportunity for hearing to have committed any flagrant or repeated violation of section 499b of this title, but this provision shall not apply to any case in which the license of the person found to have committed such violation was suspended and the suspension period has expired or is not in effect; or

(3) against whom there is an unpaid reparation award issued within two years, subject to his right of appeal under section 499g(c) of this title.

The Secretary may approve such employment at any time following nonpayment of a reparation award, or after one year following the revocation or finding of flagrant or repeated violation of section 499b of this title, if the licensee furnishes and maintains a surety bond in form and amount satisfactory to the Secretary as assurance that such licensee's business will be conducted in accordance with this chapter and that the licensee will pay all reparation awards, subject to its right of appeal under section 499g(c) of this title, which may be issued against it in connection with transactions occurring within four years following the approval. The Secretary may approve employment without a surety bond after the expiration of two years from the effective date of the applicable disciplinary order. The Secretary, based on changes in the nature and volume of business conducted by the licensee, may require an increase or authorize a reduction in the amount of the bond. A licensee who is notified by the Secretary to provide a bond in an increased amount shall do so within a reasonable time to be specified by the Secretary, and if the licensee fails to do so the approval of employment shall automatically terminate. The Secretary may, after thirty days notice and an opportunity for a hearing, suspend or revoke the license of any licensee who, after the date given in such notice, continues to employ any person in violation of this section. The Secretary may extend the period of employment sanction as to a responsibly connected person for an additional one-year period upon the determination that the person has been unlawfully employed as provided in this subsection.

(c) Fraud in procurement

If, after a license shall have been issued to an applicant, the Secretary believes that the license was obtained through a false or misleading statement in the application therefor or through a misrepresentation, concealment, or withholding of facts respecting any violation of this chapter by any officer, agent, or employee, he may, after thirty days' notice and an opportunity for a hearing, revoke said license, whereupon no license shall be issued to said applicant or any applicant in which the person responsible for such false or misleading statement or misrepresentation, concealment, or withholding of facts is financially interested, except under the conditions set forth in section 499d(b) of this title.

(d) Injunction

In addition to being subject to the penalties provided by section 499c(a) of this title, any commission merchant, dealer, or broker who engages in or operates such business without a valid and effective license from the Secretary shall be liable to be proceeded against in any court of competent jurisdiction in a suit by the United States for an injunction to restrain such defendant from further continuing so to engage in or operate such business, and, if the court shall find that the defendant is continuing to engage in such business without a valid and effective license, the court shall issue an injunction to restrain such defendant from continuing to engage in or to operate such business without such license.

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided by section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C.A. § 499n

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL COMMODITIES

→§ 499n. Inspection of perishable agricultural commodities

(a) Employment of inspectors; fees and expenses; inspection certificate as evidence

The Secretary is authorized, independently and in cooperation with other branches of the Government, State, or municipal agencies and/or any person, whether operating in one or more jurisdictions, to employ and/or license inspectors to inspect and certify, without regard to the filing of a complaint under this chapter, to any interested person the class, quality, and/or condition of any lot of any perishable agricultural commodity when offered for interstate or foreign shipment or when received at places where the Secretary shall find it practicable to provide such service, under such rules and regulations as he may prescribe, including the payment of such fees and expenses as will be reasonable and as nearly as may be to cover the cost for the service rendered: *Provided*, That fees for inspections made by a licensed inspector, less the percentage thereof which he is allowed by the terms of his contract of employment with the Secretary as compensation for his services, shall be deposited into the Treasury of the United States as miscellaneous receipts; and fees for inspections made by an inspector acting under a cooperative agreement with a State, municipality, or other person shall be disposed of in accordance with the terms of such agreement: *Provided further*, That expenses for travel and subsistence incurred by inspectors shall be paid by the applicant for inspection to the United States Department of Agriculture to be credited to the appropriation for carrying out the purposes of this chapter: *And provided further*, That official inspection certificates for fresh fruits and vegetables issued by the Secretary of Agriculture pursuant to any law shall be received by all officers and all courts of the United States, in all proceedings under this chapter, and in all transactions upon contract markets under Commodities Exchange Act (7 U.S.C. 1 et seq.), as prima-facie evidence of the truth of the statements therein contained.

(b) Issuance of fraudulent certificates; penalties

Whoever shall falsely make, issue, alter, forge, or counterfeit, or cause or procure to be falsely made, issued, altered, forged, or counterfeited, or willingly aid, cause, procure or assist in, or be a party to the false making, issuing, altering, forging, or counterfeiting of any certificate of inspection issued under authority of this chapter, sections 491, 493 to 497 of this title, or any Act making appropriations for the Department of Agriculture; or shall utter or publish as true or cause to be uttered or published as true any such false, forged, altered, or counterfeited certificate, for a fraudulent purpose, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $500 or by imprisonment for a period of not more than one year, or both, at the discretion of the court.

7 U.S.C.A. § 499p

UNITED STATES CODE ANNOTATED
TITLE 7. AGRICULTURE
CHAPTER 20A. PERISHABLE AGRICULTURAL
COMMODITIES

→§ 499p. Liability of licensees for acts and omissions of agents

In construing and enforcing the provisions of this chapter, the act, omission, or failure of any agent, officer, or other person acting for or employed by any commission merchant, dealer, or broker, within the scope of his employment or office, shall in every case be deemed the act, omission, or failure of such commission merchant, dealer, or broker as that of such agent, officer, or other person.

18 U.S.C.A. § 201

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 11. BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

→§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section--

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; [and]

* * * *

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever--

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

* * * *

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

* * * *

[Code of Federal Regulations]
[Title 7, Volume 2]
[Revised as of January 1, 2008]
From the U.S. Government
Printing Office via GPO Access
[CITE: 7CFR46.46]

[Page 285-288]

TITLE 7—AGRICULTURE

DEPARTMENT OF AGRICULTURE

PART 46_REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930--Table of Contents

Sec. 46.46 Statutory trust.

(a) Definitions. (1) "Received" means the time when the buyer, receiver, or agent gains ownership, control, or possession of the perishable agricultural commodities: Provided, That when perishable agricultural commodities have not been received as described above, and where there is a rejection without reasonable cause as provided in Sec. 46.2(bb) and (cc), the goods will be

[[Page 286]]

considered to have been received when proffered.

(2) "Dissipation" means any act or failure to act which could result in the diversion of trust assets or which could prejudice or impair the ability of unpaid suppliers, sellers, or agents to recover money owed in connection with produce transactions.

(3) "Default" means the failure to pay promptly money owed in connection with transactions in perishable agricultural commodities; i.e., within the period of time applicable to the type of transaction as established by the provisions of the regulations (Sec. 46.2(aa)), or as otherwise agreed upon by the parties.

(4) "Calendar days" as used in section 5(c) 3 of the Act means every day of the week, including Saturdays, Sundays, and holidays, except that if the thirtieth calendar day falls on a Saturday, Sunday, or holiday, the final day with respect to the time for filing a written notice of intent to preserve the benefit of the trust shall be the next day upon which there is postal delivery service.

(5) "Ordinary and usual billing or invoice statements" as used in section 5(c) (4) of the Act, and "invoice or other billing statement" as used in Sec. 46.46(f) (3), mean communications customarily used between parties to a transaction in perishable agricultural commodities in whatever form, documentary or electronic, for billing or invoicing purposes.

(b) Trust assets. The trust is made up of perishable agricultural commodities received in all transactions, all inventories of food or other products derived from such perishable agricultural commodities, and all receivables or proceeds from the sale of such commodities and food or products derived therefrom. Trust assets are to be preserved as a nonsegregated . 'floating' trust. Commingling of trust assets is contemplated.

(c) Trust benefits. (1) When a seller, supplier or agent who has met the eligibility requirements of paragraphs (e) (1) and (2) of this section, transfers ownership, possession, or control of goods to a commission merchant, dealer, or broker, it automatically becomes eligible to participate in the trust. Participants who preserve their rights to benefits in accordance with paragraph (f) of this section remain beneficiaries until they are paid in full.

(2) Any licensee, or person subject to license, who has a fiduciary duty to collect funds resulting from the sale or consignment of produce, and remit such funds to its principal, also has the duty to preserve its principal's rights to trust benefits in accordance with paragraph (f) of this section. The responsibility for filing the notice to preserve the principal's rights is obligatory and cannot be avoided by the agent by means of a contract provision. Persons acting as agents also have the responsibility to negotiate contracts which entitle their principals to the protection of the trust provisions: Provided, That a principal may elect to waive its right to trust protection. To be effective, the waiver must be in writing and separate and distinct from any agency contract, must be signed by

the principal prior to the time affected transactions occur, must clearly state the principal's intent to waive its right to become a trust beneficiary on a given transaction, or a series of transactions, and must include the date the agent's authority to act on the principal's behalf expires. In the event an agent having a fiduciary duty to collect funds resulting from the sale or consignment of produce and remit such funds to its principal fails to perform the duty of preserving its principal's rights to trust benefits, it may be held liable to the principal for damages. A principal employing a collect and remit agent must preserve its rights to trust benefits against such agent by filing appropriate notices with the agent.

(d) Trust maintenance. (1) Commission merchants, dealers and brokers are required to maintain trust assets in a manner that such assets are freely available to satisfy outstanding obligations to sellers of perishable agricultural commodities. Any act or omission which is inconsistent with this responsibility, including dissipation of trust assets, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b).

(2) Agents who sell perishable agricultural commodities on behalf of a principal are required to preserve the

[[Page 287]]

principal's rights as a trust beneficiary as set forth in Sec. 46.2(z), (aa) and paragraphs (d), (f), and (g) of this section. Any act or omission which is inconsistent with this responsibility, including failure to give timely notice of intent to preserve trust benefits, is unlawful and in violation of section 2 of the Act, (7 U.S.C. 499b).

(e) Prompt payment and eligibility for trust benefits. (1) The times for prompt accounting and prompt payment are set out in Sec. 46.2(z) and (aa). Parties who elect to use different times for payment must reduce their agreement to writing before entering into the transaction and maintain a copy of their agreement in their records, and the times of payment must be disclosed on invoices, accountings, and other documents relating to the transaction.

(2) The maximum time for payment for a shipment to which a seller, supplier, or agent can agree and still qualify for coverage under the trust is 30 days after receipt and acceptance of the commodities as defined in Sec. 46.2(dd) and paragraph (a) (1) of this section.

(3) The trust provisions do not apply to transactions between a cooperative association (as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), and its members.

(4) The amount claimable against the trust by a beneficiary or grower will be the net amount due after allowable deductions of contemplated expenses or advances made in connection with the transaction by the commission merchant, dealer, or broker.

(f) Filing notice of intent to preserve trust benefits. (1) Notice of intent to preserve benefits under the trust must be in writing, must include the statement that it is a notice of intent to preserve trust benefits and must include information which establishes for each shipment:

(i) The names and addresses of the trust beneficiary, seller-supplier, commission merchant, or agent and the debtor, as applicable,

(ii) The date of the transaction, commodity, invoice price, and terms of payment (if appropriate),

(iii) The date of receipt of notice that a payment instrument has been dishonored (if appropriate), and

(iv) The amount past due and unpaid.

(2) Timely filing of a notice of intent to preserve benefits under the trust will be considered to have been made if written notice is given to the debtor within 30 calendar days:

(i) After expiration of the time prescribed by which payment must be made pursuant to regulation,

(ii) After expiration of such other time by which payment must be made as the parties have expressly agreed to in writing before entering into the transaction, but not longer than the time prescribed in paragraph (e) (2) of this section, or

(iii) After the time the supplier, seller or agent has received notice that a payment instrument promptly presented for payment has been dishonored. Failures to pay within the time periods set forth in paragraphs (f) (2) (i) and (ii) of this section constitute defaults.

(3) Licensees may choose an alternate method of preserving trust benefits from the requirements described in paragraphs (f) (1) and (2) of this section. Licensees may use their invoice or other billing statement as defined in paragraph (a) (5) of this section, whether in documentary or electronic form, to preserve trust benefits. Alternately, the licensee's invoice or other billing statement, given to the buyer, must contain:

(i) The statement: "The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 17 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received; "and

(ii) The terms of payment if they differ from prompt payment set out in section 46.2(z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.

(4) If the invoice or other billing statement is in electronic form, the licensee has met its requirement of giving the buyer notice of intent to preserve trust benefits on the face of the

[[Page 288]]

invoice or other billing statement if the electronic invoice or other billing statement containing the statement set forth in paragraph (f) (3) (i) is sent to the buyer and the electronic transmission can be verified. The licensee will be deemed to have given notice to the buyer of its intent to preserve trust benefits if the licensee can verify that the electronic invoice or other billing statement was sent to a third party electronic transaction vendor designated by the buyer. The licensee will have met the requirement of giving the buyer written notice of intent to preserve trust benefits using electronic means if it can verify that the electronic data invoice or other billing statement was transmitted to the buyer, or its designated electronic transaction vendor, irrespective of whether or not the buyer or third party vendor downloads or accepts the trust statement.

(5) If a buyer conducts its transactions in perishable agricultural commodities using an electronic system, the buyer or its third party electronic vendor must allow sufficient space for the seller to include the required trust statement of intent to preserve trust benefits in the buyer's electronic invoices or other billing statement forms. A buyer or its designated third party electronic vendor must accept a seller's notice of intent to

preserve benefits under the trust using the required trust statement, whether in documentary or electronic form, as set forth in paragraphs (d) and (f) of this section. Any act or omission which is inconsistent with this responsibility is unlawful and in violation of Section 2 of the Act (7 U.S.C. 499b).

(Sec. 1, 46 Stat. 531, as amended; 7 U.S.C. 499a et seq.)

[49 FR 45740, Nov. 20, 1984, as amended at 62 FR 15088, Mar. 31, 1997; 62 FR 60999, Nov. 14, 1997; 72 FR 29838, May 30, 2007]

OMB Control No.